ICLG

The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2018

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A practical cross-border insight into telecoms, media and internet laws and regulations

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This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

Three general chapters. These chapters provide readers with an overview of key issues affecting telecoms, media and internet laws and regulations, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 29 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Arnold & Porter Kaye Scholer LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Europe's Digital Single Market: Mid-Term Review

Arnold & Porter Kaye Scholer LLP

Rob Bratby

Introduction and Summary

On 10 May 2017, the European Commission published its mid-term review of the implementation of Europe's Digital Single Market strategy. Launched in 2015, the ambitious digital single market strategy covers 16 actions under the three pillars:

(1) improving access to digital goods and services for consumers and businesses across Europe;

(2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; and

(3) maximising the growth potential of the digital economy.

However, despite a lot of activity, the Commission was only able to highlight one actual delivered improvement in its review – the abolition of retail roaming charges – although it looks forward to the imminent implementation of cross-border content portability in early 2018 and the expected approval of a proposal to address unjustified geo-blocking.

However, between the initiatives already being progressed and three new focus areas of (1) building the data economy, (2) cybersecurity, and (3) regulation of online platforms, the strategy seems likely to result in significant legislative change in Europe over the medium term – not least as the Commission have identified 35 proposals relating the Digital Single Market to date – summarised in the table at the end of this article.

The rest of this article addresses the three imminent results of the digital single market: roam like at home, watch like at home and abolition of unjustified geo-blocking then finishes with a summary of the DSM proposals to build Europe's data economy.

'Roam Like at Home' – Abolition of Retail Roaming Charges

From 15 June 2017, European mobile subscribers have been be able to 'roam like at home' and use their home call, text and data allowances in any other European Member State at no additional cost. This is the first tangible result of Europe's Digital Single Market strategy and results from a pro-consumer agenda consistently pursued by the European Commission since 2007 in the face of industry resistance.

The legislation underpinning the current arrangements is:

- Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union; and
- Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016 laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment.

The legislative process started back in 2007, with a 'Eurotariff' that capped intra-EU roaming charges for mobile calls. This was progressively extended to texts and data and the caps steadily reduced to get to today's position. The measures were challenged by industry, including by way of reference to the European Court of Justice (Case C-58/08) on the basis that the rules had no adequate legal basis, were disproportionate and offended the principle of subsidiary. The ECJ dismissed all these bases of challenge.

In order to address (to some extent) industry concerns, retail price control was complemented by more limited regulatory intervention in the wholesale roaming market in Europe. However, there remains ongoing concern amongst smaller operators that they will be unduly squeezed.

'Watch Like at Home?': Europe Adopts Online Content Portability Rules

On 8 June 2017, The European Council adopted the Regulation on cross-border portability of online content services. The regulation will allow consumers who have paid for online content services in their home country to access those services when visiting another country within the EU. Alongside the 'roam like at home' rules discussed above, the regulation forms part of the European Digital Single market strategy. The regulation will come into effect in the first quarter of 2018.

Deemed place of performance of otherwise restricted acts

Content is traditionally distributed and exploited on a territorial basis, underpinned by territorial copyright and related rights. To maximise value, rights are often licensed on an exclusive territorial basis, and licences will often contain terms requiring licensees to implement technical measures (such as geo-blocking) to prevent their customers from accessing licensed content outside the licensed territory.

In order to allow cross-border portability without changing existing content licences (or requiring mass rights infringement), the regulation introduces the legal mechanism of deeming that the provision of, access to and use of online content services occurs in the subscriber's Member State of residence, rather than the state in which they are temporarily present.

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Or, as explained in the preamble to the regulation:

"For the licensing of copyright or related rights, the legal mechanism laid down in this Regulation means that relevant acts of reproduction, communication to the public and making available of works and other protected subject-matter, as well as the acts of extraction or re-utilization in relation to databases protected by sui generis rights, which occur when the service is provided to subscribers when they are temporarily present in a Member State other than their Member State of residence, should be deemed to occur in the subscribers' Member State of residence. Providers of online content services covered by this Regulation, therefore, should be deemed to carry out such acts on the basis of the respective authorisations from the right-holders concerned for the Member State of residence of their subscribers. Whenever providers have the right to carry out acts of communication to the public or reproduction in their subscribers' Member State of residence on the basis of an authorisation from the right-holders concerned, subscribers who are temporarily present in a Member State other than their Member State of residence should be able to access and use the service and where necessary carry out any relevant acts of reproduction, such as downloading, which they would be entitled to do in their Member State of residence. The provision of an online content service by providers to subscribers temporarily present in a Member State other than their Member State of residence and the access to and use of the service by such subscribers in accordance with this Regulation should not constitute a breach of copyright or related rights or any other rights relevant for the provision of, access to and use of the online content service."

Impact on rights licences

The preamble to the regulation goes on to explain the impact on contractual rights:

"Providers of online content services covered by this Regulation should not be liable for the breach of any contractual provisions that are contrary to the obligation to enable their subscribers to use such services in the Member State in which they are temporarily present. Therefore, clauses in contracts designed to prohibit or limit the cross-border portability of such online content services should be unenforceable. The providers and holders of rights relevant for the provision of online content services should not be allowed to circumvent the application of this Regulation by choosing the law of a third country as the law applicable to contracts between them. The same should apply to contracts concluded between providers and subscribers."

This means that rights-owners and licensors will not be able to rely on the licence and distributions agreements to block intra-EU travelling content portability.

Applicability

The regulation applies to audio-visual media services and other linear and on-demand content services. The regulation is mandatory for paid-for services, but optional for free services – i.e. free broadcasters can take advantage of the 'deemed place' mechanism, provided that they verify their user's home Member States, but are not obliged to make their services portable cross-border.

Proof of residence and temporarily present

The regulation requires providers to effectively verify their subscribers' country of residence, but requires those checks to be reasonable and proportionate. Content can only be accessed across European borders by those subscribers when they are temporarily present in another Member State "for a limited period of time". This last provision will no doubt be clarified by further guidance and/or cases as service providers and customers test the limit of this provision.

Proposed Regulation to Ban Geo-Blocking

In 2016, the Commission proposed a regulation to address the problem of customers not being able to buy goods and services from traders located in a different Member State, or being discriminated in prices or sales conditions compared to nationals. The proposed Regulation is now under discussion in the Council and European Parliament, and in the mid-term review, the Commission expects approval in within a relatively short time.

The proposal defines specific situations when there can be no justified reasons for geo-blocking or other discriminations based on nationality, residence or location:

- when a customer buys a good, such as electronics, clothes, sportswear or a book, which the trader does not deliver cross-border;
- when a customer buys an electronically delivered service, such as cloud services, data warehousing, website hosting; or
- when a customer buys a service which is supplied in the premises of the trader or in a physical location where the trader operates, such as a hotel room or a rental car.

Further, the proposal bans blocking of access to websites and the use of automatic re-routing if the customer has not given prior consent. The proposal also provides for a non-discrimination rule in payments. While traders remain free to offer whatever payment means they want, the proposal includes a specific provision on non-discrimination within those payment means.

European data economy: the free movement of data principle *(or "don't believe everything the data protection lawyers tell you")*

The European Commission's January 2017 Communication on Building a European Data Economy ('Communication') proposes a principle of free movement of data within the EU. Whilst the coming into force of the General Data Protection Regulation ('GDPR') on 25 May 2018 significantly changes and tightens the rules relating to the collection and use of personal data in Europe, those changes need to be read alongside the Communication (and the accompanying staff working paper) to fully understand the regulatory environment for data in Europe. The Communication examines actual or potential blockages to the free movement of data and presents options to remove unjustified and or disproportionate data location restrictions in the EU. It also considers the barriers around access to and transfer of non-personal machine-generated data, data liability, as well as issues related to the portability of non-personal data, interoperability and standards.

Principle of free movement of data in the EU

Europe's Single Market is commonly understood to rest on four fundamental freedoms: freedom for people; services; goods; and capital to move within the EU. In its Communication, the Commission says:

"Any Member State action affecting data storage or processing should be guided by a principle of free movement of data within

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the EU, as a corollary of their obligations under the free movement of services and the free establishment provisions of the Treaty and relevant secondary legislation. Any current or new data location restrictions would need to be carefully justified under the Treaty and relevant secondary law to verify that they are necessary and proportionate to achieve an overriding objective of general interest, such as public security."

The Commission explains that any data location restrictions within the EU need to be justified to be lawful. To progress this issue, the Commission has entered into dialogue with Member States and others on the justifications for and proportionality of data location measures. Following these consultations and further information gathering, the Commission will consider what further action needs to be taken which may include infringement proceeding and other initiatives to ensure the free movement of data within the EU.

Improving IoT data access and transfer

Whilst respecting the protections for personal data under GDPR, the Communication sets out the Commission's objective and actions to improve data access and transfer, especially for Internet of Things ('IoT') machine-generated data. As a result of the GDPR requirement for privacy 'by design' and 'by default', the Commission envisages that much personal data will become non–personal through anonymisation. However, from an economic perspective, machine generated-data is not currently protected by the existing European Database Right, which leads to a lack of legal clarity on the terms for economic exploitation and tradability. In turn, this may inhibit companies from trading or otherwise making available non-personal datasets held by them.

The Commission proposes that the future EU framework should achieve the following objectives:

- *"**Improve access to anonymous machine-generated data**: Through sharing, reuse and aggregation, machine-generated data becomes a source of value creation, innovation and diversity of business models.*
- ***Facilitate and incentivise the sharing of such data**: Any future solution should foster effective access to data, taking into account, for example, possible differences in bargaining power between market players.*
- ***Protect investments and assets**: Any future solution should also take into account the legitimate interests of market players that invest in product development, ensure a fair return on their investments and thereby contribute to innovation. At the same time, any future solution should ensure a fair sharing of benefits between data holders, processors and application providers within value chains.*
- ***Avoid disclosure of confidential data**: Any future solution should mitigate the risks of disclosing confidential data, in particular to existing or potential competitors. In this regard it should also allow for proper data classification to be performed, prior to the assessment of whether or not a certain piece of data can be shared.*
- ***Minimise lock-in effects**: The unequal bargaining power of companies and private individuals should be taken into account. Lock-in situations, especially for SMEs and start-ups and private individuals, should be avoided."*

The Commission proposes potential action in a number of areas:

- *"**Guidance on incentivising businesses to share data**: To mitigate the effects of divergent national regulations and provide increased legal certainty for companies, the Commission could issue guidance on how non-personal data control rights should be addressed in contracts.*
- ***Fostering the development of technical solutions for reliable identification and exchange of data**: Traceability and clear identification of data sources are a precondition for real control of data in the market. The definition of reliable and possibly standardised protocols for persistent identification of data sources can be necessary to create trust in the system. Application Programming Interfaces (APIs) can also foster the creation of an ecosystem of application and algorithm developers interested in the data held by companies. APIs can help firms and public authorities to identify, and profit from, different types of re-uses of the data they hold. On this basis, broader use of open, standardised and well-documented APIs could be considered, through technical guidance, including identification and spreading of best practice for companies and public sector bodies. This could include making data available in machine-readable formats and the provision of associated meta-data.*
- ***Default contract rules**: Default rules could describe a benchmark balanced solution for contracts relating to data, taking due account also of the ongoing Fitness Check on the overall functioning of the Unfair Contract Terms Directive. They could be coupled with introducing an unfairness control in B2B contractual relationships which would result in invalidating contractual clauses that deviate excessively from the default rules. They could also be complemented by a set of recommended standard contract terms designed by stakeholders. This approach could lower legal barriers for small businesses and reduce the imbalance in bargaining positions, while still allowing a large degree of contractual freedom.*
- ***Access for public interest and scientific purposes**: Public authorities could be granted access to data where this would be in the "general interest" and would considerably improve the functioning of the public sector, for example, access for statistical offices to business data, or the optimisation of traffic management systems on the basis of real-time data from private vehicles. Access to business data by statistical authorities would typically contribute to alleviating the statistical reporting burden on economic operators. Similarly, access to and the ability to combine data from different sources is critical for scientific research in fields such as medical, social and environmental sciences.*
- ***Data producer's right**: A right to use and authorise the use of non-personal data could be granted to the "data producer", i.e. the owner or long-term user (i.e. the lessee) of the device. This approach would aim at clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine-generated data. However, the relevant exceptions would need to be clearly specified, in particular the provision of non-exclusive access to the data by the manufacturer or by public authorities, for example, for traffic management or environmental reasons. Where personal data are concerned, the individual will retain his right to withdraw his consent at any time after authorising the use. Personal data would need to be rendered anonymous in such a manner that the individual is not or no longer identifiable, before its further use may be authorised by the other party.*
- ***Access for fair remuneration**: A framework potentially based on certain key principles, such as fair, reasonable and non-discriminatory (FRAND) terms, could be developed for data holders, such as manufacturers, service providers or other parties, to provide access to the data they hold for remuneration after anonymisation. Relevant legitimate interests, as well as the need to protect trade secrets, would need to be taken into account. The consideration of different access regimes for different sectors and/or business models could also be considered in order to take into account industry differences."*

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The Commission will undertake both general and sector-specific discussions with stakeholders to discuss how to best take these issues forward.

Clarifying liability rules

The Communication identifies ambiguity in the current rules on liability in the data economy in relation to products and services based on emerging technologies such as the IoT, the factories of the future and autonomous connected systems. Whilst noting that IoT is a rapidly growing network of everyday objects, such as watches, vehicles, and thermostats, which are connected to the Internet and that autonomous connected systems, such as self-driving vehicles, act independently of humans and are capable of understanding and interpreting their environments and that each is likely to contribute to more safety and quality of life, the Commission highlights that:

"Inevitably there remains the possibility of design errors, malfunctioning or manipulation in every device. This could result from the transmission of erroneous data by a sensor, due to, for instance, software defects, connectivity problems or incorrect operation of the machine. The nature of these systems means that it may be difficult to establish the exact source of a problem that leads to damages, raising the issue of how to ensure that these systems are safe for the users, in order to minimise the occurrence of damage and who should be held liable for damage if it occurs."

The Communication highlights that the issue of how to provide certainty to both users and manufacturers of such devices in relation to their potential liability is therefore of central importance to the emergence of a data economy. The Commission, therefore, will consult stakeholders on the adequacy of current EU rules on liability in the context of IoT and autonomous connected systems, as well as on possible approaches to overcome the current difficulties in assigning liability. A parallel public consultation on the overall evaluation of the application of the Products Liability Directive is also being conducted. The Commission will assess the results and consider options for future action, which in addition to the *status quo* may include:

- **Risk-generating or risk-management approaches**: Under these approaches liability could be assigned to the market players generating a major risk for others or to those market players which are best placed to minimise or avoid the realisation of such risk.
- **Voluntary or mandatory insurance schemes**: Such schemes could be coupled with the above liability approaches. They would compensate the parties who suffered the damage (e.g. the consumer). This approach would need to provide legal protection to investments made by business while reassuring victims regarding fair compensation or appropriate insurance in case of damage.
- **Portability, interoperability and standards**: Finally, the Commission identifies further barriers to the data economy: non-portability of personal data and a lack of system interoperability in part stemming from a lack of appropriate standards. The Commission is, therefore, also consulting on:
  - "**Developing recommended contract terms to facilitate switching of service providers**: As data portability and switching of data service providers are mutually dependent, the development of standard contract terms requiring the service provider to implement the portability of a customer's data could be examined.
  - **Developing further rights to data portability**: Building on the data portability right provided by the GDPR and on the proposed rules on contract for the supply of digital content, further rights to portability of non-personal data could be introduced, in particular to cover B2B contexts, whilst taking due account of the outcome of the ongoing Fitness Check on key pieces of EU marketing and consumer law.
  - **Sector-specific experiments on standards**: To develop a robust approach to portability rules encoded through standards, sector-specific experimental approaches could be launched. These would typically involve a multi-stakeholder collaboration including standard setters, industry, the technical community, and public authorities."

The Commission has published a high-level summary of responses from its initial consultation, and is now in the process of carrying out a series of workshops.

Conclusion

The Commission's objectives for the European Digital Single Market are wide-ranging and ambitious. Their proposals have the potential to both invigorate and disrupt existing business models. Whilst the 2017 review is expressed to be a mid-term review and we can expect to see more legislation adopted in the next two years, the small percentage of completed initiatives indicate that this is a multi-year programme that is only just starting and will have impacts for many years to come.

Commission proposal and initiatives
Pillar I – Better access for consumers and businesses to digital goods and services across Europe
Legislative proposals for simple and effective cross-border contract rules for consumers and businesses: ■ Proposal for a Directive on certain aspects concerning contracts for the supply of digital content. ■ Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods.
Review the Regulation on Consumer Protection Cooperation: ■ Proposal for a revision of the Regulation on Consumer Protection Cooperation.
Measures in the area of parcel delivery: ■ Legislative proposal in the area of parcel delivery.
A wide-ranging review to prepare legislative proposals to tackle unjustified geo-blocking: ■ Legislative action to prevent geo-blocking and other forms of discrimination against consumers based on nationality or residence. ■ Guidance on the application of the Unfair Commercial practices Directive.
Competition sector inquiry into e-commerce, relating to the online trade of consumer goods and the online provision of digital content: ■ Launched on 6 May 2015. ■ Preliminary Report on the e-commerce sector inquiry (15 September 2016). ■ Public consultation on Preliminary Report until November 2016.

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Commission proposal and initiatives
Legislative proposals for a reform of the copyright regime: ■ Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market. ■ Communication "Towards a modern, more European copyright framework" – Copyright I. ■ Legislative proposals (Regulation and Directive) on permitted uses in copyright for print-disabled persons and implementing the Marrakesh Treaty. ■ Directive on copyright in the Digital Single Market. ■ Communication "Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market" – Copyright II.
Review of the Satellite and Cable Directive: ■ Proposal on the exercise of copyright and related rights in certain online transmission of broadcasting organisations (Regulation).
Legislative proposals to reduce the administrative burden on businesses arising from different VAT regimes: ■ VAT for e-Commerce Package – proposals to amend Council Directives 2006/112/EC and 2009/132/EC (cross-border e-Commerce and e-publications).
Pillar II – Creating the right conditions for digital networks and services to flourish
Legislative proposals to reform the current telecoms rules: ■ Proposal for a Decision on the use of the 470 – 790 MHz frequency band in the Union. ■ Review of wholesale roaming markets. ■ European Electronic Communications Code – Recast. ■ BEREC Regulation. ■ Legislative proposal to promote Internet connectivity in local communities (Wi-Fi4EU). ■ Communication on a 5G Action Plan. ■ Communication on Connectivity for a competitive DSM.
Review the Audio-visual Media Services Directive: ■ Review the Audio-visual Media Services Directive.
Comprehensive analysis of the role of platforms in the market including illegal content on the Internet: ■ Commission assessment of the role of platforms in the market including tackling illegal content on the Internet.
Review the e-Privacy Directive: ■ Proposal for an e-Privacy Regulation.
Establishment of a Cybersecurity contractual Public-Private Partnership: ■ Commission Decision (C2016/4400) on the signing of a contractual arrangement on a public-private partnership for cybersecurity between the EU and the stakeholder organisation. ■ Communication on Strengthening Europe's Cyber Resilience System and Fostering a Competitive and Innovative Cybersecurity Industry.
Pillar III – Maximising the growth potential of the Digital Economy
Initiatives on data ownership, free flow of data (e.g. between cloud providers) and on a European Cloud: ■ Communication on a European Cloud Initiative. ■ Communication on Building a European Data Economy.
Priority ICT Standards Plan and extending the European Interoperability Framework for public services: ■ Communication 'Digitising European Industry – Reaping the full benefits of a DSM'. ■ ICT Standardisation Priorities for the DSM. ■ Revision of the European Interoperability Framework.
New e-Government Action Plan including an initiative on the 'Once-Only' principle and an initiative on building up the interconnection of business registers: ■ EU eGovernment Action Plan 2016 – 2020 accelerating the digital transformation of government. ■ Proposal for a Regulation of the European Parliament and of the Council on establishing single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012.

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Chapter 2

A Regulatory Re-Think?

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Preiskel & Co LLP

1 Introduction

The past year might have given some the impression that we are heading towards another "Age of Extremes", and the technology and telecoms sectors are no exception.

The UK and Europe were pioneers in the liberalisation of telecoms markets which saw the break-up and regulation of former state monopoly telecoms companies. The implementation of the European Framework has, in many parts of Europe, been successful, leading to better outcomes for consumers and businesses, where competition and investment has followed liberalisation.

However, with questionable mobile signal coverage in many rural areas and one of the lowest levels of FTTx penetration in the OECD, many in the UK have been asking what has gone wrong in the UK?

In the internet sector, too, there is the impression that competition law is not quite living up to its *raison d'être*. The past decade has seen considerable concentration in the industry, and consolidation of the market power of those at the top, often without much regulatory scrutiny.

Brexit may give us in the UK an opportunity to re-visit and re-assess existing EU regulation.

This raises a number of questions:

- Are we blindly walking into another age of monopoly?
- How can we better implement our regulatory framework to ensure the best consumer outcomes in the long term?
- How will the ever-omnipresent shadow of Brexit impact on this?

2 Is Current Regulation Working?

The basis for the UK's telecoms regulation is found in a series of EU Directives. Historically, the way in which this framework has been implemented in the UK, and across Europe, has been with a view to ensuring the best outcomes for consumers, in particular by reference to price. UK merger control has also tended to focus on the price implications of mergers, and, with some exceptions, only scrutinises mergers where the parties involved meet certain turnover levels.

The focus on financial outcomes isn't inherently illogical or wrong, *per se*, and a focus on short-term consumer welfare – in the relatively easy-to-model form of pricing outcomes – is a central tenet of competition law and regulation worldwide. However, the risk is that the current framework is implemented in the UK with undue focus on the short term, failing to properly consider the long-term outcomes of regulatory decisions, or the future shifts that may be seen in the market.

The focus on short-term consumer welfare and measurable impacts on post-merger prices is a common issue among merger control authorities. One example of overly focusing on consumer welfare means that dominant companies may be able to stifle competition through acquisition. Internet giants like Google and Facebook, who hold considerable market shares in Internet Search and Social Media, respectively, as well as various other projects each company invests in, are able to purchase innovative start-ups "under the radar", since the turnover of the purchased company is below merger assessment thresholds.

An example in telecoms regulation is found in Ofcom's 2016 Business Connectivity Market Review (BCMR), where the regulator implemented a price cap in the form of the Leased Line Charge Control (LLCC) on BT/Openreach's wholesale Ethernet lines. The essential rationale was to drive the dominant incumbent's infrastructure wholesale prices down towards cost. The reduced wholesale prices would be passed on to businesses and consumers, allowing for price reductions across the industry.

Lower prices sounds like a fantastic outcome for all involved, so what's the problem? BT/Openreach is a huge organisation with a legacy network already built across the whole of the UK. Economies of scale and scope mean its costs are likely to be below that of any new-entrant competitor, although Ofcom did not do the modelling to determine this for sure. With fast and reliable fibre connections becoming a necessity for business and leisure, the upcoming "5G revolution" in mobile, and BT/Openreach's track record of under-investment and failure to meet FTTx targets, now more than ever the UK needs alternative infrastructure providers, with innovative, faster, more reliable network architecture than BT/Openreach's tree-and-branch network. Lower prices in the short term may thus restrict the opportunity for competitive investment and be undermining the UK's digital future in the medium to longer term.

3 What Can be Done to Improve Implementation of the Current Framework?

The current framework for regulation and competition law is not necessarily broken beyond repair; regulatory and competition authorities have scope to work within the legal framework to address some of the issues of market concentration and decreasing levels of innovation.

There is scope within the existing framework for the focus to be on more than just pricing outcomes. Yes, it is easier to accurately model short-term pricing effects, with concepts such as innovation, particularly in the long term, being generally more difficult to

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determine and calibrate. This may be limited by the current modelling methods used by economists, with their focus on Upward Pricing Pressure (UPP) and post-merger outcomes based on historic information of pre-merger market dynamics and pricing. And yes, of course regulatory bodies and competition authorities feel more able to make decisions based on the more reliable short-term data than potential long-term outcomes. However, no investigation of the effects of transactions on innovation is routinely conducted.

Seen in the context of the increasingly concentrated market structure, it is vital for the UK's digital future that regulatory bodies and competition authorities investigate innovation and market structure. Take Google's acquisition of Beat That Quote, for example. Beat That Quote was an online insurance company, small by comparison to others in the insurance industry. Economic modelling in the OFT's investigation indicated that it was unlikely that Google would use its market power in Internet Search and online advertising to promote this online insurance company in search rankings, because that would mean foregoing revenue from other companies who were sponsored links at the top of Google search. If the aim of any reasonable business endeavour is to profit maximise, there would be little economic logic in the short term in such action.

However, somewhat predictably, after the deal was approved, that is exactly what Google did. The economic rationale for such an approach is anti-competitive and recognised in the case law on abuse of dominance; Google sought to promote its own product to the detriment of its rivals, in an effort to exclude others from the market and maximise its profits from being one of the very few players left providing online insurance quotations. Google has now been fined £2.4bn for self-promotion of its own online price comparison products at the expense of its rivals by the EU Commission. Actions like this aim to guarantee future revenue stream through maintaining a company's position to the detriment of competitors, while foregoing an element of short-term revenues. The authorities' focus on short-term profit maximisation means such possible outcomes are often not duly captured in modelling; yet the impact on competition in the market and the effect on other players, the choices available to users, and the prospects for market structure to deliver future innovation can be significant.

Indeed, the EU has to an extent been leading the way in this respect, raising innovation concerns in a number of merger situations in the last few years – although there is undoubtedly more that can be done. One example of this is in the Novartis/GlaxoSmithKline merger, where concerns were raised about the parties' oncology business, where the Commission required the parties to divest one of the pipeline projects in order to mitigate risks to innovation. Another example where innovation concerns were addressed by the Commission is the General Electric/Alstom merger, where concerns were raised about the impact on innovation in the energy sector. Again, the Commission approved the acquisition of Alstom's energy business by General Electric subject to divestment of central parts of Alstom's heavy duty gas turbines business. The recent Dow/DuPont decision continues in this vein, as approval to the merger was given conditionally on divestment of DuPont's global pesticide business over innovation concerns about reduced numbers of new "active ingredients" in the pesticides business to be developed per year by the merged entity.

It is clear innovation is something the European Commission is increasingly concerned about; even so, the indications are that authorities are predisposed to favour relying on the available historic evidence of pricing implications than in investigating the evidence of detrimental impact upon innovation. To avoid unsatisfactory medium- and long-term outcomes for consumers, more focus *needs* to be placed on factors other than short-term consumer welfare in the form of pricing, and the scope is there in the law to do this.

4 Making Lemonade: Reform of UK Competition Law and Regulation After Brexit

The previous section focused on what can be done within the current legal and regulatory framework. However, as readers will be aware, much of this framework is based on European legislation, and as the UK is currently in the process of negotiating an exit from the European Union, currently set to be completed by March 2019, the obvious question is what happens next?

While some competition lawyers, many of whom started their careers being called "European law experts", may be concerned by the approach of the great unknown, might it be best to see the upcoming shift in paradigms as an opportunity for the UK to become a leader, at the forefront of competition and regulatory law and policy, to create a regime suitable for a fast-paced, technology-dominated market.

What possible reforms could be implemented?

In telecoms regulation, the focus could shift from ensuring short-term prices match the dominant provider's costs. Emphasis could instead be on ensuring barriers to entry are lowered to encourage market entry from disruptive new players, who invest in competing infrastructure. This would lead to more intense competition in the provision of telecoms infrastructure and services, which would, in time, increase capacity in the system and bring better quality, innovative products to consumers at lower prices.

In the merger control regime, changes could also be made to the turnover thresholds. This might include lowering the threshold, to capture some of the "under-the-radar" mergers mentioned above. It might include making merger assessment based upon the value of the transaction in question, rather than the turnover of the target entity. This has been done in Germany. Another approach would be to monitor the acquisitions of all dominant companies for their effect on innovation. To be clear only those companies that have already been found to be dominant would be subject to such scrutiny, since many smaller deals between non-dominant players would be of no concern.

Alternatively, or additionally, the merger control regime with its focus on consumer welfare could be reformed to bring in matters that are of public concern and general regulation under consumer protection law. Further (non-economic) public policy considerations can be included for scrutiny of mergers and acquisitions, such as the levels of personal data held by each relevant party. The EU data protections authorities have been calling for this approach for some time.

Another consideration currently under consideration by the EU and the UK authorities and something that has been a matter of merger control might be whether any infrastructure owned by the relevant parties could be deemed "Critical National Infrastructure" (CNI). Such reform is likely to include communications infrastructure, and might limit the extent to which foreign parties can purchase UK telecoms companies, or impose special conditions on those that do.

5 Conclusions

The above raises just a small number of current issues to be considered and potentially reformed. This will no doubt be an interesting sector to watch over the next few years, and these issues are likely to develop with or without Brexit, or whatever form Brexit eventually may take.

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He speaks seven languages and is particularly recognised for commercial and regulatory work in the UK and overseas. He was formerly an investment banker specialising in telecoms & technology and was recently elected during MWC to the EMEA Board of MEF (Mobile Ecosystem Forum), is a co-founder of the International MVNOx Association and former Vice-Chair of the IBA Communications Law Committee.

PREISKEL & CO

Preiskel & Co LLP is a City law firm which specialises in UK and multi-jurisdictional corporate, commercial (including IPR), and regulatory matters with a particular focus on telecommunications, media, and technology. Since its foundation in 2004, the firm's practices has expanded beyond its core expertise in TMT to build leading competition and telecoms regulatory practices.

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Consumer Trust, Regulation and the Mobile Opportunity

Mobile Ecosystem Forum

Rimma Perelmuter

Introduction

Fifteen years ago, mobile content and services extended to simple Java games and ringtones or as text-to-vote platforms that encouraged viewers to interact with their favourite reality TV shows. Very little, apart from the mobile number, was tracked or known about the consumers that used them.

The mass adoption of smartphones and faster mobile networks have of course changed the opportunity from those early days beyond all recognition. The smartphone has become the key to our digital lives. And just as the mobile handset upped the *ante* on the quality of content, services and customer interactivity, it has now opened a fire hydrant of personal data that is captured by the companies that provide services in this new, data-driven era.

Understandably this makes consumers uncomfortable. Real-world concerns around the abuse of their personal data, data breaches and identity theft are increasingly defining how many people feel about using this new breed of services.

At the regulatory level, the EU's General Data Protection Regulation (GDPR) expands the rights of EU citizens around privacy and protection of personal data. Among other things, it requires that all data processors – which is most companies – maintain adequate data records, disclose data breaches and increase opt-in and opt-out options. Heavy fines are on the table for companies found in breach.

In August 2017, the UK government issued a 'statement of intent' to strengthen its data privacy laws via a new Data Protection Bill. Like GDPR this will include the right to be forgotten, the right to require social media platforms to delete information when asked, and tighter regulation on default opt-out or pre-selected tick boxes.

In Europe and elsewhere, data holders are taking note and the principles of good stewardship around privacy, security and identity have been elevated to boardroom level issues. Consent, control and data portability are fundamental to mobile product and service design. Consumers must give permission before any data is collected. Data must be transferrable and it must be deleted or returned upon request.

In reality, GDPR and the new Data Protection Bill reflect the changing consumer attitudes and behaviours around data driven services and the rise of the 'savvy consumer' – a smartphone user that jealously guards her privacy and security, and is prepared to take action if a provider is seen as abusing that trust.

Concurrently, there is a growing awareness amongst savvy consumers that their data is valuable; an asset that needs to be treated with respect, or even as something that the use of, delivers a reciprocal benefit to them.

The Consumer Trust Opportunity

And whilst regulation is beginning to do an effective job in championing the rights of individuals, there is a commercial imperative to build **consumer trust** and value around how individuals engage with and are rewarded for sharing personal data.

As part of our Consumer Trust Initiative, MEF established a multi-stakeholder working group in 2011. The group is united by a commitment to building a trusted and profitable data-driven ecosystem, which rewards consumers and businesses alike. One that highlights consumers' privacy, identity and security concerns whilst addressing how to drive good stewardship and innovation around data protection as a business imperative.

Under the guidance of the working group, MEF recently published its 4th annual Consumer Trust Study. The Study, supported by ForgeRock, Orange, and digi.me, surveyed 6,500 consumers in 10 markets and explored the attitudes and behaviours of smartphone users globally, providing detailed insights into consumer understanding and motivations around mobile content and services.

This year's study aimed to help businesses understand consumers' motivations and behaviours when it comes to privacy, identity and security and how their data is used. At the same time, we surveyed how consumers are reacting to some of the principles being introduced in GDPR.

The headlines statistics are hard-hitting. When asked why they do not use more apps and services, 40% named one or more trust issues as the most important factor. Privacy (16%) remains the most influential trust related concern, closely followed by security (15%).

The majority also do not ike sharing data and the number of people always happy to share personal information has dropped from 6% in 2016 to 3% in 2017. 39% are uncomfortable sharing personal data – and claim they never do, while a further 32% are 'reluctant sharers' – uncomfortable sharing data but aware they must if they want to use the app or service in question.

Savvy consumers are highly sensitive to trust issues and motivated to take action – both positive and negative. 86% have taken action as a result of trust concerns, e.g. warning friends and family of a suspicious app or service. By the same token, almost half (47%) would recommend a trustworthy app to friends and family. And when asked what makes an app or service trustworthy, 33% said a 'clear, simple privacy statement'.

But rather than hitting an *impasse*, a diverse community of start-ups, personal data holders, privacy advocates, technologists and innovators are trialling new business models around a disruptive and powerful idea – The Personal Data Economy – which puts

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individuals in control of their personal information and allows them to share it with businesses, brands and other trusted third parties on their own terms.

Interest in this space is growing for reasons of efficiency and ethics. The average individual has personal data stored in dozens of different locations but it can be hard to access this information and then share it. Giving this data back to individuals would solve this whilst addressing the significant concerns individuals have about the way companies gather data about as demonstrated by the MEF 2017 Study. The notion is appealing to business across a variety of sectors who can build better tailored services, loyalty and value for consumers. This could include basic ID, health and information, financial records, buying history, social media activity and more.

MEF's recent white paper on Understanding the Personal Data Economy explores the opportunities for a value exchange that is key to unlocking the opportunity. Companies such as atomite, digi.me, Cozy Cloud, Meeco, and Synergetics, for example, are developing commercial models, platforms and architecture that operate in this space where personal data and the individual's control of it is put to work to improve consumer interaction with businesses, brands, governments and public institutions.

Consumers Want Benefits

What is clear is that the days when companies could collect personal data without offering anything in return are long gone. Consumers are beginning to understand the value of their data and seek opportunities to benefit from this new currency.

But what benefits are they seeking? When we asked them, the top answer was not money; 29% named financial rewards and 23% requested discounts on real world products and services but most asked for **control**. 31% said they would be convinced to hand over personal information only if it could be returned or deleted at a time of their choosing. The good news for the businesses that participate in the Personal Data Economy is that consumers instinctively recognise the benefits of new data driven mobile services.

And since it is the consumer that controls, updates and manages their own personal data, the quality of the data aggregated is greatly improved. A change of address, job, income or any other data point no longer needs to reside in multiple silos on company servers. Rather it lives with the consumer, allowing the individual to efficiently update and aggregate multiple data sets.

The more mobile users engage with their data – adding to it, updating it, verifying it and ultimately providing permission for its use – the more valuable the data becomes to the company requesting to use it.

MEF's Consumer Trust Survey also suggests that there is strong latent demand for data driven services – 43% said they would be interested in a privacy-focused app that shows what data is being collected across all their connected devices. Many consumers can already picture how data portability might make their life more convenient with 29% saying they would appreciate a service that facilitated, for example, a change of address, while 25% would appreciate faster identity verification.

The Personal Data Economy depends on a transparent and clear value-exchange, which makes it attractive to share data. Yet, since there is value locked up in data, some businesses are tempted to grab what they can and obfuscate consent with lengthy privacy policies or assume a tick of one box effectively gives them access to an individual's data.

MEF's study found that 75% say they sometimes or always read a privacy policy or T&Cs before signing up to a mobile app or service. And GDPR is explicit about consent and personal data, mandating measures that will, amongst other things, improve transparency (explaining in plain English now, why they are collecting personal data at the point they are collecting it and how they intend to use it).

Implied consent and bundled consent (where permission is included with terms and conditions) will no longer be allowed and access to consent data must be readily available to individuals that request it.

Summary

Whilst regulation focuses on addressing many of the trust concerns identified by consumers, applying innovation to implementation and trialling new business models is key. As such, it would be a mistake to look at regulation such as GDPR as simply a compliance issue for the legal team.

All members of the personal data ecosystem, including regulators, legal professionals, product innovators, data holders and enablers of data-driven products and services need to collaborate and evolve best practices in a way that builds trust and value for consumers.

We believe it is a matter of strategy and a shift in how companies need to think about engaging the consumer in a way that builds trust, loyalty and value. Companies who place the consumer trust at the heart of the process will resonate with the new breed of savvy consumers who understand the value of their data.

The key is to offer meaningful choice and control over how their data is managed and to create a fair and equitable value exchange tailored to meet the needs of the consumer. There is a tremendous opportunity to leverage customer data to create intuitive and superior experiences that enrich consumers' lives whilst creating a sustainable profitable business. Handled well, consumer trust is also the prize.

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Rimma Perelmuter is CEO & Global Board Director at Mobile Ecosystem Forum (MEF).

Since first executing its launch in 2001, Rimma has led MEF's rapid global expansion across the diverse markets of Africa, Asia, EMEA and the Americas; establishing MEF as the premier mobile association that acts as an impartial and authoritative champion for the broadening mobile ecosystem.

Her focus at MEF has been both mission-driven and commercial; building strategic partnership and working with diverse ecosystem players on leading initiatives to solve industry problems, drive market impact and achieve commercial gains.

Rimma is a passionate advocate and commentator on the importance of building trust in data driven services and speaks at leading industry events including MEF's Consumer Trust Summit, CES and the GSMA's Mobile World Congress.

Recognised annually as one of the top 50 women in mobile, she is also on the Advisory Board of Women in Wireless (WiW) which champions women in mobile and digital.

MEF
MOBILE ECOSYSTEM FORUM

The Mobile Ecosystem Forum is a global trade body that acts as an impartial and authoritative champion for addressing issues affecting the broadening mobile ecosystem. We provide our members with a global and cross-sector platform for networking, collaboration and advancing industry solutions.

The goal is to accelerate the growth of a sustainable mobile ecosystem that drives inclusion for all and delivers trusted services that enrich the lives of consumers worldwide.

Established in 2000 and headquartered in the UK, MEF has Chapters across Africa, Asia, Europe, the Middle East, Latin and North America.

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Armenia

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(i) The key telecoms and audio-visual media market players are three mobile operators: Viva Cell MTS Armenia (84.1bn AMD in 2016); UCom Telecommunication Company (34.9bn AMD in 2016); "Armenia Telephone Company" (acting under Beeline trademark), and some major broadband operators, like GNC-ALFA (acting under Rostelecom Armenia trademark) with 5.6bn AMD in 2016, "Arminco" LLC, CrossNet LLC and some others.

(ii) The key audio-visual media distribution market players are the abovementioned UCOM and "GNC-ALFA" CJSC – the most prominent participants – and some major participants such as "Arpinet" LLC, "Interactive TV" LLC. The main local media content developer in line with Public Television are the Panarmenian media group (Armenia TV) and Shant TV.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

Armenia's telecommunications and internet industries are mainly regulated by the following acts:

a. Law number HO-176-N, dated 08 July 2005, on "Electronic Communication";

b. Law number HO-18-N, dated 25 December 2003, on "Public Services Regulatory Body";

c. Law number HO-49-n, dated 18 May 2015, on "Personal Data Protection";

d. Law number HO-193, dated 30 May 2001, on "Licensing";

e. Law number HO-97, dated 09 October 2000, on "Television and Radio"; and

f. Decrees and other decisions of the PSRC and State Commission on TV and Radio.

Armenia's audio-visual media distribution sector is governed by the following acts:

a. Law number HO-97, dated 09 October 2000, on "Television and Radio";

b. Law number HO-55, dated 30 April 1996, on "Advertisement";

c. Law number HO-193, dated 30 May 2001, on "Licensing";

d. Law number HO-14, dated 13 December 2003, on "Mass Media";

e. Law number HO-97, dated 09 October 2000, on "Television and Radio"; and

f. Decrees and other decisions of the PSRC and the State Commission on Radio and Television.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

From the more general point of view of the legislature, the General Assembly of the Republic of Armenia (the "RA") is a regulatory body which enacts the laws governing the sector, as well as the government of the RA. The Ministry of Transport, Communication and Information Technologies is the line ministry with responsibility over communications and media.

Further special independent agencies regulate specific issues:

- The Public Services Regulatory Commission ("PSRC") of the RA is responsible for licensing the operators and overseeing the rendering of services.
- The TV and Radio Commission is responsible for licensing and controlling the TV channels, including control over the air broadcasting, CATV, rebroadcasting and other TV and Radio related issues.
- The State Commission for the Protection of Economic Competition of the RA should also be mentioned as the body responsible for competition issues.
- There is also a self-regulatory body, namely the "Association of Armenia TV cable operators".

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(i) Telecoms, including internet and audio-visual media distribution sectors, have been liberalised, but they are still under the supervision of regulatory commissions. Article 4 of the Law on Television and Radio Broadcasting states that the Republic of Armenia guarantees the right to freedom of selection, production and broadcast of television and radio programmes, and forbids censorship. During the last 10 years, the process of licensing has been liberalised and some licences have been abolished.

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(ii) The telecom sector is open for foreign investment. According to Article 10 of the Law on Electronic Communication, the Regulator cannot refuse to give a licence or permission to an applicant who satisfies all requirements only on the ground that the latter is a citizen of any foreign country or a foreign organisation. Most of the players on the market have foreign participation; for some of them the foreign participation is 100 per cent, including two mobile and one major broadband operator. However, this is not the case for TV. This is technically the only sector in Armenia where there is a limitation on foreign investment: at least 50 per cent of operators' capital must have their origin from Armenia. According to Article 16(2) of the Law on Television and Radio Broadcasting, at the time of establishing TV and radio companies, the amount of foreign capital shall not be more than or equal to 50 per cent of the share capital required for the adoption of decisions of the broadcasting organisation. Larger shares can be defined by interstate agreements.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

The Republic of Armenia has been a member of the WTO since 05 February 2003. Armenia made horizontal and sector-specific commitments under the GATS in the area of telecommunications under GATS/SC/137, dated 29 April 2004. The State is yet to implement the WTO Basic Telecommunications Reference Paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of telecoms networks and services is regulated by the laws on electronic communications, as well as by the licence conditions provided by the regulatory body in the following ways:

a. licensing of activity;
b. regulation of healthy competition and antimonopoly activity in the field of communication;
c. organisation of radiofrequencies uses; and
d. other regulation directions set out by the legislation of Armenia.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The regulatory body in the sphere of telecommunications is the Public Services Regulatory Commission, established by the order of the President in 1997, and renamed afterwards based on the law adopted by the General Assembly of the RA in 2004. The Commission on TV and Radio is also a regulatory authority in the sphere of audio-visual media. The competition law authority in Armenia is the State Commission for the Protection of Economic Competition. The latter aimed only at the protection of economic competition, meanwhile the PSRC and the State Commission on TV and Radio has a wide jurisdiction. The members of these commissions are appointed by the President or by the General Assembly of RA, but they are independent from the government.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The decisions of the regulatory body can be appealed in the Administrative court of RA.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

For all telecoms companies, a licence is required in order to possess, exploit telecom networks, or to provide telecoms services to customers. In addition to the network licence, if the telecoms company is to use a radiofrequency (e.g. for wireless transmission of the data within the network), then permission to use the dedicated radiofrequency must be received from the PSRC.

If the provided services also include provision of telephone connectivity, numbering permission shall be obtained from the PSRC. And finally, if the company uses existing networks of third parties to provide services, there is no licensing requirement. However, there is a requirement to notify (the PSRC) before starting to provide services to clients. There is also a licence requirement for TV and Radio companies, and approval for rebroadcasting is necessary under the law for TV and Radio.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

In order to obtain a licence, the following information must be included in the application addressed to the regulatory authority:

a. the full name and requisites of the company, including its State registration number;
b. the business plan with the below information:
    1. the purpose of exploiting the public electronic communication network and the anticipated economic, social and industrial results;
    2. the general description of the network and its technical aspects and indicators;
    3. the information on research of the market;
    4. the main technical and technological solutions;
    5. the area of exploitation of the network;
    6. the description of premises used for exploitation of the network;
    7. the timetable of the exploitation of the network by stages; and
    8. the effectiveness of the investments (the risk management of investments, the possible financial sources, the periods of establishment and exploitation of the network, etc.); and
c. the act of payment of the State fee.

For obtaining a licence for TV and Radio activity, the following information must be included in the application addresses to the regulatory authority:

a. the full name and the address of the company;
b. thematic orientation of TV and Radio programmes;

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c. the area of exploitation;
d. information on the founder;
e. volume of programmes produced by the applying company and by other Armenian producers; and
f. the applications' submission date.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The licence is granted for a period of 10 years, which can be prolonged upon the application of the company with sufficient justification.

The licence itself cannot be transferred or sold to a third party; it is inalienable.

However, the control over the company which possesses the licence can be transferred to a third party upon the approval of the regulatory authority. A transfer such as this includes the transfer or sale of the shares, or their pledge, or the change in any other manner of the authority of the company. If the transfer of the control over the company is made in any other manner than cited above, then there is no need to obtain the approval of the regulatory authority; it will suffice to inform the regulatory body in writing about the change.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

According to Article 14 of the Land Code, the special terms of use of lands allocated for energy, communication, transport and infrastructural objects are determined according to procedures defined by the law.

In accordance with the Land Code (Article 50), the land can be loaded by servitude for placement, exploitation and rehabilitation of electric cables and communication wires through the area.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

In accordance with the Law on Electronic Communication (Article 33), one of the duties of operators is to interconnect with other operators. Interconnection among operators is regulated by contracts (hereinafter: "interconnection contracts"). The Law establishes minimum requirements with respect to interconnection contracts. Interconnection contracts must include technical, economical issues, terms set by the Law and other issues set by the parties to the contract.

Disputes related to interconnection and access matters are settled by the Regulator. The Law defines the special procedure for resolving disputes between operators. In cases where there is disagreement with the decision, the parties are entitled to apply to the respective courts of Armenia.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Article 37 of the Law on Electronic Communication states that payments for interconnection and interconnection services provided by dominant operators should be transparent and public. The components of the payments should be clearly separated, and the cost calculation methods should be published.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The issue of charges for interconnection and/or network access is regulated by Article 37 of the Law on Electronic Communication. The fees for interconnection or its components shall be on the basis of a reasonable allocation of the service or component of the service for a long-term cumulative cost of the total duration of the service and future expenditures, which includes:

a. costs incurred to ensure equal interconnection;
b. expenses arising from the performance of the net interconnection requirements;
c. reasonable capital expenditure; and
d. a reasonable allocation of expenses in the future.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The public network operators are subject to accounting separation. According to the Law on Electronic Communication, the Regulator shall establish accounting standards and report requirements for public electronic communication networks operators and service providers.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

This is not applicable in Armenia.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The Regulator sets tariffs for public electronic communications services subject to regulation by the dominant provider in the provision of services and regulates them. They are also authorised to regulate the public electronic communication services provided by non-dominant providers in the provision of services, if such regulation is necessary to protect the competition and public interest. However, the Regulator is not authorised to settle the charges for internet access made by the internet service provider. The Regulator sets tariffs for universal services rendered to the public by the non-dominant provider in the provision of services.

The retail price for communication services is set by operators independently. However, if a telecoms operator imposes prices that are too high, it may then be subject to antitrust proceedings.

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2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Consumers are free to choose the operator and provider as well as to demand high-quality telecommunications services. The universal service consists of policy approved by the Regulator and approved by the competent authority and consulted with all stakeholders to access the minimum number of services available, which should be affordable for all users regardless of geographical position. The scope of the universal services should be expanded by technological advancements and economic development.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The Regulator shall adopt a decision on establishing a State's Numbering Plan, formulating the use of numerical sequences used for electronic communications in the Republic of Armenia, identification and use of short codes in accordance with international requirements. The State's Numbering Plan should identify the numbering rows, identification and short codes needed to provide electronic communications services in the country.

The numbers and the codes are allocated the request of the operator by the regulatory body, for a time period of no longer than 10 years. In order to obtain a number and/or a code, the operator shall have the required specialisation, the required number and/or code shall not be possessed by the other operator, it shall not be used for purposes other than telecommunication purposes under the international agreements, etc.

2.17 Are there any special rules which govern the use of telephone numbers?

Any operator or service provider is authorised to request the Regulator for a code. The Regulator defines the requirements for submitting a request for a code that must include information that enables the Regulator to determine whether the applicant has the qualifications required for possession or use of such numbers or codes.

The code is issued for up to 10 years, unless the applicant requires a shorter period. However, they cannot be issued for a period exceeding the licence of the operator.

2.18 Are there any obligations requiring number portability?

Since 2014, Armenian operators have given consumers the opportunity to change their operator without changing the number or code, but there is no obligation to require number portability.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Usage of the radio spectrum in Armenia is generally controlled by the Ministry of Transport, Communication and Information Technologies. The main regulatory body which allocates radio spectrum is the Public Services Regulatory Commission of RA (the "PSRC"). Also, the Radio Frequency Management Coordinating Committee is an interagency body coordinating the management of radio frequency spectrum in the Republic of Armenia.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The use of the radio spectrum is authorised if the person/company has obtained permission to use the radio spectrum from the PSRC. The permission is given after the submission of the application and relevant necessary documents (which are prescribed by the law and the PSRC's decisions).

The permission of radio spectrum use is given for a maximum of 10 years.

If a specific radio frequency is included in the list of frequencies which must be allocated via contest or auction (this list is established by the PSRC's decision), the allocation of such frequencies has to be done via contest (auction).

The specific rules of each contest/auction are set by the PSRC, though general rules are prescribed by the law on "Electronic" Communications.

The permission of radio spectrum use can also be obtained via acquiring a licence of radio broadcasting, or a licence for providing private multiplex services. In this case, the licence is given by the National Committee of TV and Radio. Radio broadcasting licences are issued by the committee based on contest results between different applicants. A contest is not held if the radio broadcasting will be transmitted only by a cable. In that case, a simple application is needed for getting a licence. Licences for radio broadcasting are given for 10 years. A licence for providing private multiplexer services is always issued via contest through the National Committee of TV and Radio.

Also, permission for radio spectrum use can be obtained by getting a licence from the public electronic communications network (if the operation of the network requires usage of radio spectrum). In these cases, the relevant licence and the permission for radio spectrum use can be issued at the same time.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

It must be noted that the use of the radio spectrum is generally authorised only if the person/company has obtained permission to use the radio spectrum from the PSRC, even if no licence is needed for the particular economic activity of the person/company.

Using the radio spectrum can be permission-exempt in cases of operation of low power devices which emit radio frequency rays, provided that such devices are of the types approved by the PSRC or relevant foreign standard setting bodies, as set forth in the appropriate regulations.

Also no permission is needed:

1. for the use of land mobile subscriber stations (terminals);
2. for the use of mobile terrestrial subscriber stations (terminals) of global mobile satellite communication systems;
3. for the use of consumer and medical ultra-high-frequency equipment without open radiation which has a power of up to 5 watts; and
4. in other cases set by the PSRC in its decisions.

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3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The rates of mandatory fees for issuing a radio frequency authorisation and for using a radio frequency are annually established by a separate annex to the State Budget law upon the recommendation of the PSRC.

The State fees required for getting a licence for radio broadcasting, a licence for the operation of the public electronic communications network and a licence for providing private multiplex services are defined by the law on State fees.

The State fee required for getting a licence to operate within the public electronic communications network is 100,000–500,000 AMD per year depending on the coverage of the network.

The State fee required for getting a licence of radio broadcasting is 150,000–250,000 AMD depending on the amount of coverage broadcast. The State fee required for keeping the licence is 25,000 –150,000 AMD per year depending on the coverage of broadcast.

The State fee required for getting a licence for providing private multiplex services is 100,000,000 AMD per year.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Prior to the transfer of ownership of an entity which has a licence to use the public electronic communications network or the permission of radio spectrum use needed to provide public electronic communications services, such entity must obtain the consent of the PSRC, and such consent cannot be unreasonably withheld.

In order to obtain such consent, the said entity shall file a written request, submitting the information and documents requested by the latter. The law on Electronic Communications also provides special rules concerning change of control for entities having a dominant position in the market.

The other entities not mentioned above are not required to obtain consent from the PSRC. However, they are obliged to notify the PSRC in written form at least 15 working days prior to the change of control.

It must be noted that the extent of foreign capital in radio broadcasting entities/private multiplexers must be less than 50 per cent (except for the cases when other regulations are set in international treaties signed by RA).

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

The licences/permissions cannot be sold, sub-licensed, traded or otherwise transferred to a third party.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Each operator and service provider must consider and maintain confidential information about the type, location, purpose, destination, quantity, and specifications of the services used by its customers.

The operator or service provider is authorised to disclose the information:

a. in cases and in the manner prescribed by law, in respect of prosecution of any threat of a criminal offence or its national security;

b. upon the written consent of the customer: and

c. if the disclosure is necessary for the protection of the operator or service provider (proceedings against that operator or service provider), the customer may request that disclosure be made confidential through closed-door proceedings.

The operator or service provider also has the right to disclose information about their client's payments, debts, obligations and their performance, to credit bureau provided by the Law of the Republic of Armenia "On Credit Information Circulation and Credit Bureau" in the manner and within the limits prescribed by this Law.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Article 33 of the Constitution of Armenia states that everyone shall have the right to freedom and secrecy of correspondence, telephone conversations and other means of communication. Freedom and secrecy of communication may be restricted only by law, for the purpose of state security, economic welfare of the country, preventing or disclosing crimes, protecting public order, health and morals or the fundamental rights and freedoms of others.

The acts governing the ability of authorities to obtain access to private communications are the Constitution, the Criminal Procedure Code and the Law on Operation-Investigation Activity. These legal acts establish the grounds to obtain access to private communication.

The secrecy of communication may be restricted only by court decision, except where it is necessary for the protection of State security and is conditioned by the particular status of communicators prescribed by law.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

According to Article 50 of the Law on Electronic Communications, a person other than a party to a message transmitted by any electronic communications means may only intercept, record, or disclose the content of such message with the written consent of the parties to the message or upon a court order in cases and in the manner provided for by law. Operators of public or private electronic communications networks and providers of public or private electronic services, as well as their employees or representatives, may intercept or redirect messages or signals, without disclosing them, where such interception or redirection of signals is conditioned by the exercise of their official duties. In cases and in the manner provided for by law, all operators and service providers shall be obliged to provide access to law enforcement and national security personnel to any communications equipment, facilities, switches, routers, or other similar equipment, including wiretapping devices. The law does not directly clarify to which means of telecommunications these apply. It can be considered that it covers also traditional calls, VoIP calls, emails and any other forms of telecommunications.

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4.4 How does the state intercept communications for a particular individual?

According to the Criminal Procedural Code, a court decision shall be issued in order to commence interception and checking of mail delivered by post, telegraph and other communications, and interception of conversations via telephone or other means of communication, information sent via other communication and technical channels.

In cases where delay in the implementation of the measures of interception can lead to a terrorist act or threats to national security, military or environmental threats, based on the decision of the head of the operative-search body, it is allowed to carry out such measures without prior decision of the court (Article 284 of the Criminal Procedural Code).

In such cases, the investigator shall, within 48 hours, submit the material relating to this investigative procedure to the court exercising judicial supervision and the prosecutor in charge of the procedural aspects of the investigation in order for them to verify the legality of the investigative procedure conducted. In cases where the court finds that the grounds for the implementation of the operative-search measures are insufficient, the interception is immediately terminated, and the materials and data obtained as a result must be eliminated promptly.

Pursuant to Article 241 of the Criminal Procedural Code, interception of conversations held by telephone and other devices, or of information sent by communications media or other technical means, shall not last longer than six months.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are no specific legal rules for the government to require disclosure of encryption keys. An encryption key may be requested to be disclosed to the State authorities only in the cases prescribed above.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Data retention can be required by court order (generally as an interim measure). Article 5.2(k) of law on Electronic Communications states that the PRSC can set standards of data archiving for providers of electronic communications services.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is regulated by the Law on Television and Radio, the Law on Advertisement, as well as by the licence conditions stipulated by the Commission.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

There are no general legal rules regulating the distribution of content (including advertising) in the internet sector. The Law on Advertising does not provide specific provisions on the legal regulation of online advertising. Advertising content delivered over the internet is subject to the provision of the Law on Advertising.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

There are two types of licences for audio-visual media distribution:

a. The licence to distribute audio-visual media via digital broadcasting network. This type of licence is accorded to the winner of the contest organised by the National Commission of TV and Radio. The selection process is governed by the law of RA on TV and Radio and the decrees of the Commission.

b. The licence to distribute audio-visual media via cable broadcasting network. This type of licence is accorded upon the application of the company addressed to the Commission. All the necessary documents and procedure of issuing the licence are defined by the law of RA on TV and Radio and the decrees of the Commission.

The main obligations of the licensed entities are to carry out their activities according to the law on TV and Radio as well as to comply with the requirements stipulated in their licences.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

The licence is inalienable, and cannot be sold or otherwise transferred to a third party. The extent of foreign capital in TV/radio broadcasting entities must be less than 50 per cent (except the cases when other regulations are set in international treaties).

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

In court cases related to defamation via internet, the Cassation Court of the RA stated that, according to the Civil Code of RA, a person is relieved of responsibility in the event of the simultaneous existence of two conditions:

a. the presented facts are a literal or conscientious reproduction of a person's public speeches, official documents, copyrighted works, and media outlets; and

b. when distributing information, reference has been made to the source of information.

It is a general principle in the legislation of Armenia that no-one should be held liable for content on the internet of which they are not the author, as long as they do not specifically intervene in that content or refuse to obey court orders to remove that content, where they have the capacity to do so.

In addition, according to Article 416.1, electronic communications service operators and internet service providers shall not be liable for the content of electronic documents transmitted through their information systems by third parties, unless otherwise provided for by law or an agreement with the service provider.

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6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

An obligation to assist content owners via blocking/removing illegal content may arise by the force of a court decision. Generally, court orders are necessary to enforce content blocking/removing.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The concept of "net neutrality" does not exist in the legislation of Armenia. Different types of traffic can be blocked by the providers or operators according to the court's decision. According to the law on Electronic Communications of RA, the operators are obliged to provide services without discrimination. Telecommunication operators and internet service providers are not able to differentially charge different types of traffic over their networks.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

According to Article 7 of the Law of RA on Mass Media, it is prohibited to disseminate secret information as stipulated by law, or information advocating criminally punishable acts, as well as information violating the right to privacy of one's personal or family life.

It must be separately noted according to the regulations of ISOC (admin of ".am" and ".հայ" ccTLDs) there are regulations on blocking illegal content under the said domains (blocking of the domain). The new policy on the use of domains and mechanisms of blocking is now being reviewed and is expected to be adopted by the GM of ISOC or the board by the end of the year.

Telecoms operators are bound by the obligation to block websites/content when such a decision is made by a competent court.

There is currently no obligation to block VPN services. Consumer VPN services are currently not regulated by legislation.

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Australia

MinterEllison

Anthony Borgese

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The telecommunications and audio-visual media distribution sectors continue to be affected by shifts in consumer behaviour and attitudes driven primarily by technology.

Telecommunications (including internet) sector

As mobile and internet connectivity in Australia approaches peak saturation, industry growth for the highly-regulated telecommunications industry has remained relatively flat. Consumers continue to switch to mobile telecommunications (which accounted for 49.6% of telecommunications products and services in 2016–17) coupled with cable or naked DSL broadband services through internet service providers (**ISPs**), reducing demand for fixed-line telecommunications and telephones.

Revenue for the telecommunications industry in 2016–2017 was A$43.4 billion, representing a 1.3% decrease year-on-year (**YOY**) and in line with marginal industry revenue growth at an annualised rate of 0.1% over five years through 2017–18. Revenue continues to be concentrated at the top with incumbents Telstra Corporation Limited (**Telstra**) (40.0%) and SingTel Optus Pty Limited (**Optus**) (16.9%) accounting for a combined estimate of 56.9% of the telecommunications market. Telstra and Optus focus on both wired and wireless telecommunications services, while Vodafone Hutchison Australia Pty Limited (**Vodafone**) (7.4%) focuses solely on wireless telecommunications. Households represent 63.4% of the telecommunications market, an increase fuelled by higher mobile usages by individuals. However, a slowdown in the growth of mobile telecommunications sales in Australia results from smartphone penetration peaking, with smartphone ownership in Australia reaching 84% in 2016.

The Australian Federal Government (**Government**) continues with the roll-out of the public-funded nbn™ fixed-line multi-technology network, introduced by the former Labor government in 2009 to provide a fibre-to-the-premises network covering over 93% of the Australian population (**nbn™**). The nbn™ Multi Technology Mix includes a combination of fibre to the node/curb/basement, hybrid fibre-coaxial (**HFC**) cable, fibre to the premises technologies. Designed, built and operated by NBN Co (established under the *National Broadband Network Companies Act 2011*), nbn™ is at the halfway mark at August 2017 and is estimated to cost $49 billion on completion, target to be 2020. Telstra, Optus and TPG continue to be major players in the nbn™ marketplace. However, there have been a number of new entrants including Vodafone and Amaysim over the past year.

Competition continues to intensify in the telecommunications industry in 2016–2017, continuing the five year trend. Newer players including TPG Telecom Limited (**TPG**) and Vocus Communications (**Vocus**) continue to slowly absorb market share by promoting newer technologies and products, and capitalising on the rollout of nbn™, while Optus and Vodafone continue their aggressive pricing strategy on Telstra. On the mobile telecommunications front, TPG announced in April 2017 that it had successfully acquired 2 × 10MHz of mobile spectrum in the 700MHz band for $1.26 billion as part of its larger $1.9 billion capital expenditure plan to deploy a fully operational Australian mobile network. TPG joins Telstra, Optus and Vodafone as the fourth mobile network operator in Australia, and will spend $600 million over three years to roll out a mobile network that is expected to achieve 80% population coverage. TPG's 700MHz spectrum licence commences from 1 April 2018 and expires on 31 December 2029. Vodafone announced its acquisition of 2 × 5MHz of spectrum in the 700MHz band for $286 million at around the same time.

On the regulatory front, the Australian Competition and Consumer Commission (**ACCC**) has increased focus on encouraging competition into the communications sector, launching a 'Communications sector market study' in September 2016 to examine the existing or emerging competition and consumer issues in the sector. A final report is expected to be released in early 2018. The Australian Parliament is also considering new legislation to encourage competition in the telecommunications industry, with the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017* providing for the reduction of regulation for smaller and superfast networks.

The $9.5 billion (revenue in 2016-2017) Australian telecommunications reseller industry is highly competitive and has low market concentration. Vocus, through its merger with M2 Group Ltd in February 2016, is the largest telecommunications reseller with an estimated market share under 5.0%. Resellers are heavily dependent on the price they acquire telecommunications services from carriers as the industry's offerings are differentiated on price.

The ISP industry, which include both telecom infrastructure owners and leasees, provide internet access via fixed lines to businesses, households and governments, is one of the fastest growing sectors in the technology sector. The ISP industry grew 5.8% YOY in revenue to $5.2 billion in 2016–2017 and is expected to grow partly as a result of the nbn™ rollout. The ISP industry is highly concentrated, with

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the top four players Telstra (46.8%), TPG (30.2%), Vocus (9.9%) and Optus (9.4%) accounting for an estimated 95% of industry revenue.

Audio-visual media distribution

Free-to-air television broadcasting (**FTA**) viewership continue to decrease *in lieu* of growths in consumption of AV media online and in online piracy. Accordingly, revenue for the FTA industry declined 2.3% YOY in 2016–17 to $4.9 billion as advertisers move towards online platforms. In a clear signal of the continual decline of the FTA industry, Ten Network Holdings Limited, which was the third largest player in the FTA industry holding 14.4% of market share, behind Seven West Media Limited (25.5%) and Nine Entertainment Co Holdings Limited (22.5%), entered into voluntary administration in June 2017 despite reporting a revenue growth of 7.2% in 2015–2016.

The pay television (**Pay TV**) industry is still dominated by Foxtel Group (**Foxtel**), which holds 75.7% of the market share, with the second largest player, Telstra, trailing at 17.8%. Pay TV industry revenue has declined by 1.3% YOY to $4.0 billion due to intensifying competition from online subscription video on demand (**SVoD**) platforms like Netflix (29% quarter-on-quarter growth at for January–March 2017) and Stan. The rollout of the nbn™ is also expected to increase demand for internet protocol television (**IPTV**) services over Pay TV.

Australia is clamping down on online piracy. Section 115A of the *Copyright Act 1968* (Cth) came into effect on 27 June 2015 providing copyright owners with the ability to apply to the Federal Court of Australia (**FCA**) for an injunction requiring an internet service provider (**ISP**) to take reasonable steps to block access to certain copyright-infringing sites. Late-2017, the FCA granted injunctions in *Roadshow Films Pty Ltd v Telstra Corporation Ltd* (2016) FCA 1503 (being two proceedings heard together) requiring ISPs to block access to four file-sharing sites and a streaming site, making it the first successful application under section 115A. However, the ISPs neither agreed nor opposed to the grant of the injunctions. Despite increased efforts to prevent online piracy, it is expected that online piracy will continue to be an issue.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The object of regulation in the telecommunications market is to promote access by customers to innovative and affordable services by increasing competition in the telecommunications industry and protecting the interests of consumers.

The principal legislation governing these sectors are:

- the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**) – deals with licensing and the rights and obligations of carriers and service providers;
- the *Broadcasting Services Act 1992* (Cth) (**BSA**) – regulates broadcasting (including digital television services), subscription services, online content (for ISPs), narrow casting and datacasting;
- the *Radiocommunications Act 1992* (Cth) (**RCA**) – regulates radio-frequency spectrum management and licensing; and
- the *Competition and Consumer Act 2010* (Cth) (**CCA**) – provides both general competition regulation and a telecommunications-specific competition regulation regime.

The telecommunications (including internet) sector is also subject to:

- the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) – establishes the universal service obligation and consumer protection regulation;
- the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) – regulates interception and law enforcement, prohibits telecommunication service providers from disclosing information about their customers' use of telecommunications services, and was recently amended to include data retention obligations; and
- the *National Broadband Network Companies Act 2011* (Cth) – governs the ownership, control and reporting obligations of NBN Co.

The Vertigan Panel's Independent Cost-Benefit Analysis and Review of Regulation (**Vertigan Review**) made recommendations to the Government in relation to the introduction of a new telecommunications sector regulatory framework. Recommendations made under the Vertigan Review were expected to commence on 1 January 2017 but have not been given effect. Recommendations that have not been given effect on the expected date include the repeal of Part 7 and amendment of Part 8 of the Telecommunications Act.

In June 2017, the Government published the '2017 Telecommunications Reform Package' (which was consulted on in December 2016 to February 2017) following from the Vertigan Review, aimed at reforming the telecommunications market to promote competition and to improve access to broadband services to all Australians. These reforms will likely come into effect on 1 July 2018 once legislation is passed by the Australian Parliament.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

Telecommunications, internet and audio-visual media distribution is regulated by the Government. The key bodies are:

- the Minister for Communications and the Minister for Regional Communications – administers the Department of Communications and the Arts, the Government's department that provides advice, analyse, develop and deliver programmes on the communications industry (including television, radio, internet, phone, post and the changes in digital technologies);
- the Attorney-General's Department – administers the TIA Act, however, does not investigate crimes;
- the Australian Competition and Consumer Commission – promotes competition within the telecommunications industry and ensures that the consumers' interests are protected;
- the Australian Communications and Media Authority (**ACMA**) – oversees the regulation of the technical and non-competition aspects of the telecommunications industry including the development and monitoring of compliance of industry codes of practice; and
- the Telecommunications Industry Ombudsman – provides an independent dispute resolution service for telephone and internet complaints.

The key non-government industry bodies are:

- the Communications Alliance – unifies the Australian communications industry and its members in facilitating open, effective and ethical competition between service providers and providing a forum for the telecommunications industry;
- Broadcast Australia – owns and operates multimedia transmission infrastructure in Australia and provides analogue and digital television and analogue radio for the Australian Broadcasting Corporation and Special Broadcasting Service; and

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- the Australian Communications Consumer Action Network – a Government-funded communications consumer organisation that represents individuals, small businesses and not-for-profit groups as consumers of communications products and services.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Liberalisation

As discussed in question 1.1, the sectors continue to be liberalised, in particular:

- competition in the telecommunications sector is being liberalised inorganically by the increase in competition driven by the building of nbn™ and increasing regulatory focus, and organically by digitisation and the shift towards mobile telecommunications services; and
- in the audio-visual media distribution sector, competition in the FTA and Pay TV industries have continued to be intensified, driven by the rise of SVoD platforms and online medial consumption sources.

The telecommunications sector had historically been largely centralised and monopolised before the establishment of an additional publicly-owned carrier in 1981 by the Government, AUSSAT, which was later acquired by Optus in 1992. Comparatively, the telecommunications sector has been liberalised, but there is still room for increased competitiveness.

Foreign investment

The Treasurer of Australia is ultimately responsible for all decisions related to foreign investment and for the administration of the Australian foreign investment policy. Foreign Investment Review Board (**FIRB**) administers the *Foreign Acquisitions and Takeovers Act 1975* (Cth) in accordance with the Australian foreign investment policy, in addition to advising and assisting the Treasurer.

The telecommunications and audio-visual medial distribution sectors are open to foreign investment, subject to restrictions.

Telecommunications (including internet) sector

The telecommunications sector is considered to be sensitive with regard to foreign investment and, therefore, there are lower thresholds provided for foreign investment. Foreign investment to acquire developed commercial land on which stored communication is held or that has a telecommunications network unit is also subject to a lower threshold. Approvals may also be subject to stricter requirements.

The *Telstra Corporation Act 1991* (Cth) restricts:

- aggregate foreign ownership in Telstra to 35% of shares in the issued capital of Telstra (**Telstra Shares**) not owned by the Commonwealth of Australia; and
- aggregate ownership in Telstra by an individual foreign person (and their associates) cannot exceed 5% of Telstra Shares not owned by the Commonwealth of Australia, subject to certain exemptions provided for in *Telstra Corporation (Ownership – Interests In Shares) Regulations 1997*.

NBN Co cannot be invested in by foreign persons until such time it is privatised, and may be subject to certain foreign investment restrictions including if the Communications Minister prohibits certain ownership or control over NBN Co.

The Communications Minister may impose additional carrier licence conditions on individual carriers in relation to foreign investment.

In September 2017, the FIRB announced an increased focus on enhancing its compliance arrangements for foreign investment. This includes placing additional resources into foreign investment compliance, developing a revised framework, undertaking rolling annual compliance audits and establishing clearer enforcement policies.

Media

Government approval is required for foreign investment of 5% or more in the media sector, regardless of value.

Currently, embattled network Ten Network Holdings Limited is subject to a competitive takeover process involving bids from American commercial broadcasting network, CBS, and a recently rejected joint bid from Australian media moguls Lachlan Murdoch and Bruce Gordon. To finalise its proposed takeover bid, CBS will require foreign ownership approval from the FIRB.

The rejected joint Murdoch-Gordon bid was subject to amending existing media ownership laws including the 2 out of 3 rule and the 75% reach rule (further discussed in question 5.3 below). The Government successfully sought to overturn both rules by way of the *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017*, which passed through the Senate on 14 September 2017.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Australia has been a member of the World Trade Organisation (**WTO**) since 1 January 1995. Australia has made commitments under the GATS in a Schedule of Specifics and under the Fourth Protocol on Basic Telecommunications and adopted the WTO Basic Telecommunications Reference Paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of telecommunications networks and services are regulated under legislation listed in question 1.2 above and by bodies in question 1.3 above.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The key regulators are the Australian Competition and Consumer Commission, which regulates competition and consumer issues and the Australian Communications and Media Authority, which regulates technical issues.

The ACCC and ACMA function independently from the government except where the Communications Minister has residual regulatory powers including, in relation to, the imposition of conditions to carrier licences and directing the ACCC and ACMA in some respects of their performance of their regulatory powers.

Other key bodies are set out in question 1.3 above.

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2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions made by the ACCC may be appealed to the Australian Competition Tribunal (**ACT**) on its merits, and the Federal Court of Australia can hear appeals from the ACT in limited circumstances.

Decisions made by ACMA may be appealed to the Administrative Appeals Tribunal on its merits and to the Federal Court of Australia for judicial review on administrative law grounds.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The Telecommunications Act distinguishes between:

- carriers – entities that own telecommunications infrastructure on which carriage and content services are provided to the public and hold a carrier licence;
- carriage service provider (**CSPs**) – entities that have direct contact with consumers and use carriage services to supply phone and/or internet services to the public; and
- content service providers.

Most carriers are carriage service providers.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Each entity has to apply for an individual carrier licence. The application requirements are:

- the applicant has to be a corporation, eligible partnership or a public body;
- the application has to be made in writing in the form approved by ACMA; and
- any applicable fee must be paid (including any annual carrier licence charges).

ACMA may refuse to grant a carrier licence to an applicant under certain circumstances including if the applicant is disqualified (e.g. failure to pay any applicable charges) and must not grant a carrier licence if it is deemed to be prejudicial to security and directed by the Attorney-General.

CSPs and content providers are not required to be licensed, but are still subject to the Telecommunications Act.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Carrier licences (as described above in question 2.6) do not have a stated term but can be surrendered by the carrier or cancelled by ACMA. While there are no express prohibitions for the transfer of carrier licences, it is ACMA's view that carrier licences cannot be transferred.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Carriers may install, inspect and maintain telecommunications infrastructure in accordance with the Telecommunications Code of Practice (**TCOP**) on public and private land, subject to statutory notification as applicable, objections by owners or occupiers of that land made under the TCOP to the carrier and any direction handed to the carrier by the TIO. A 2015 court case interpreted 'maintain' to include conduct that ensures the proper functioning of a telecommunications facility including drawing electricity from a premises, subject to the carrier providing appropriate compensation.

Such telecommunications infrastructure must be 'low-impact facilities' having low visual impact (e.g. antennae, underground cabling and cable pits and public payphones), with additional categories applicable specifically to nbn™. nbn™, in particular, has taken advantage of these 'low-impact facilities' rules to deploy important network infrastructure and equipment potentially outside the scope of local planning laws.

In June 2017, the Government sought comment on further changes to the 'low-impact facilities' rules, which, if approved, would potentially expand the types of infrastructure that nbn™ could deploy under these rules.

In response, TPG and independent telecommunications provider, Superloop Ltd, have argued that all carriers, and not just nbn™, should be enabled to take advantage of 'low-impact facilities' installation rules. They contend that nbn™ unfairly benefits from such rules by making it easier to deploy important network infrastructure, despite having the same obligations in relation to their fibre-to-the-basement networks.

Carriers may be required to pay an amount for any financial loss or damage to the land owner caused by that carrier when entering and inspecting the land, or installing or maintaining a low impact facility.

The powers and immunities above may not apply in some circumstances, in which case, rights of land access and tenure must be negotiated with each individual land owner, subject to state and territory laws.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

It is a standard term in carrier licences that the carrier provides any-to-any connectivity between the carriers' telecommunications network and any interconnected network.

Networks built, upgraded, altered or extended to residential and small business users after 1 January 2011 with a usual download speed of more than 25 megabits per second (i.e. superfast carriage services) are required to operate on an open access, wholesale-only and non-discriminatory basis, and offer a basic connectivity service (layer 2 bitstream) on a wholesale basis. The Minister of Communications declared that all superfast carriage services provided by licensed carriers are subject to these conditions and it is expected be remade after its expiry on 30 June 2018. The requirement was designed to ensure that private operators do not favour profitable metropolitan

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areas and place the nbn™ model at risk as NBN Co was established with a wholesale-only, open access mandate.

The ACCC can 'declare' a carriage service or a service that facilitates that carriage service, to promote competition, achieve any-to-any connectivity and encourage economically efficient use of, and investment in, infrastructure. Carriers and CSPs are required to make declared services available on request by access seekers and to:

- allow interconnection of facilities;
- take all reasonable steps to ensure service quality and fault handling is equivalent to what the service provider provides to itself; and
- provide billing information to the access seeker.

Types of telecommunications services that have been 'declared' include superfast broadband access services, local bitstream access services, wholesale ADSL and line-sharing services.

There is no general right of access by access seekers or consumers to telecommunications services. The telecommunications service must first be 'declared' by the ACCC as described above or have their special access undertaking accepted by the ACCC. Carriers are required to provide access to their passive infrastructure to other carriers on request. Part 20A of the Telecommunications Act also sets out a regime for certain developers to install certain fixed-line facilities and provide access to carriers, to support telecommunications rollout in new developments.

Interconnection or access disputes are resolved as follows:

- the ACCC can set default 'up front' price and non-price terms and issue interim and final access determinations for each declared service; and
- the Minister for Communications can make principles to be applied in determining price-related terms and conditions in 'Ministerial pricing determinations'.

A person can also give the ACCC a special access undertaking (**SAU**) or access agreement (for NBN Co) setting out the terms and conditions of providing access to an access seeker. SAUs are subject to acceptance by ACCC.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

NBN Co, NBN Tasmania Limited, NBN Co Spectrum Pty Ltd and any companies over which NBN Co is in a position to exercise control must publish a standard access agreement or provide an access undertaking to the ACCC for certain services.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The ACCC can set default 'up front' price terms and issue access determinations. Terms in SAUs prevail over access determinations, and access agreements prevail over access determinations and SAUs to the extent of any inconsistency.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Telstra is subject to a Structural Separation Undertaking (**SSU**) which commenced 6 March 2012 in relation to its involvement in the deployment of nbn™, under which Telstra undertakes to:

- progressively migrate its fixed line voice and broadband customers onto the wholesale nbn™; and
- promote equivalence and transparency and ensure that wholesale customers gain access to key input services during the transition from Telstra's copper and HFC networks to nbn™.

Operators of superfast carriage networks built, upgraded, altered or extended to residential and small business user after 1 January 2011 must offer services on a wholesale-only basis (see question 2.9 above), which imposes structural separation on providers who also offer retail services.

The ACCC can make record keeping rules for accounting separation,; however, none are in existence after the revocation of the Telstra Accounting Separation Record Keeping Rules in 2014.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

In addition to existing telecommunications regulation, Parts 7 and 8 of the Telecommunications Act apply specifically to certain superfast carriage networks built, upgraded, altered or extended to residential and small business users after 1 January 2011, requiring such networks to operate on an open access, wholesale-only and non-discriminatory basis (see question 2.9 above). These requirements are extended to all superfast carriage networks in the *Carrier Licence Conditions (Networks Supplying Superfast Carriage Services to Residential Customers) Declaration 2014* made by the Minister of Communications, which sets out additional reporting requirements on certain wholesale-only and non-wholesale-only carriers.

NBN Co was established with a wholesale-only, open access mandate (subject to certain exceptions) with the nbn™ Multi-Technology Mix (see question 1.1 above). NBN Co entered into a renegotiated agreement with Telstra to acquire its HFC assets in 2014, however, recently switched from its plans to use Optus's HFC network in favour of deploying fibre-to-the-distribution point technology.

With regard to passive infrastructure sharing, carriers are required to provide access to their passive infrastructure to other carriers on request under the Facilities Access Code. Part 20A of the Telecommunications Act also sets out a regime for certain developers to install certain fixed-line facilities and provide access to carriers, to support telecommunications rollout in new developments.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

CSPs that offer or provide local calls are obliged to give residential and charity customers the option of untimed local data and voice call services. CSPs must also offer untimed local voice call services to their other customers.

The Minister of Communications can make price control determinations for specific carriers. The price control determination for Telstra was repealed in 2015 and is unlikely to be reintroduced.

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2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Registered industry codes maintained by ACMA set out certain minimum standards and requirements in relation to advertising of services, billing practice and information, credit management practice, transfer of telecommunications services between providers, complaint handling process and privacy.

ACMA also sets out procedures for transferring (porting) telephone numbers between providers and enabling consumers to choose a preferred provider for pre-selectable services.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

ACMA makes the Numbering Plan under the Telecommunications Act setting out the framework for the numbering of, and use of numbers in connection with the supply of, carriage services in Australia.

2.17 Are there any special rules which govern the use of telephone numbers?

The Numbering Plan sets out rules including:

- the numbers for public and non-public use;
- specification of and restrictions on use of certain types of numbers;
- requirement for carrier or carriage service provider to implement number portability; and
- rates chargeable on particular types of numbers.

Industry codes by the Communications Alliance set out additional requirements and procedures that govern the use of telephone numbers.

2.18 Are there any obligations requiring number portability?

Carriage service providers or carriers must ensure that they have the technical capability required to give effect to number portability and available technology to do so in a way that provides 'equivalent service' to any ported number and enables end-to-end connectivity. The Numbering Plan and the Communications Alliance codes set out procedures and requirements for number portability.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The ACMA, principally under the RCA and the BSA. The Minister for Communications and the Arts retains some additional powers in relation to the regulation of spectrum planning and spectrum licence allocation.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Authorisation is in accordance with the tripartite licensing regime set out in the RSA and in a manner consistent with the spectrum plan and any applicable frequency band plans.

The ACMA may issue the following:

a) spectrum licences authorising the use of parts of the spectrum in a particular geographic area by specified licensees;

b) apparatus licences authorising the operation of specified radio-communications devices by specified licensees; and

c) class licences authorising any person to operate specified radio-communications devices, or radio-communications devices for specified purposes.

The ACMA is required to determine in writing the procedures to be applied in allocating licences, but has relative flexibility in the selection of the mechanism. Multi-bid auction processes have typically been favoured as the preferred approach for the issue of spectrum licences and apparatus licences that are used for broadcasting purposes, while other forms of apparatus licence are typically issued over-the-counter in accordance with a pre-determined fee schedule.

This licensing regime is currently the subject of a review and consultation process. A draft bill to amend spectrum licencing released for consultation in mid-2017 contemplates the consolidation of spectrum and apparatus licences into a single licence class but still under the regulatory purview of the ACMA.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Licence exemptions exist in respect of carrying out specific defence, international relations, emergency services and law enforcement functions and in certain emergency situations.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

No licence fees are payable for class licences.

With respect to spectrum and apparatus licence fees, the calculation will depend on the method of allocation (such as if by auction, the winning bid price).

Where the licence is issued for broadcasting, the fees will be a function of the broadcaster revenue.

In the 2016–17 financial year, commercial radio broadcasters received a licence fee exemption.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

A spectrum licence will be unaffected by a licensee change of control provided that the conditions imposed by the licence continue to be met and the change of control does not result in a concentration of media control that is unacceptable under the BSA.

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3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Generally, spectrum and apparatus licences are able to be assigned, traded and sub-licensed. However, the ACMA has the power to issue a determination that a particular licence is not transferrable or that a particular licence is not transferable in certain circumstances. For example, the ACMA may restrict the assignment of licences issued for defence purposes, or where a licence was issued for public or community services.

Transfer only takes effect upon registration by the ACMA.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Cybersecurity is regulated by the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth) in conjunction with various state and territory crimes legislation (together, the **Crimes Legislation**). The Crimes Legislation establishes certain internet-based offences relating to unlawful access and computer trespass, damaging data and impeding access to computers, theft of data, computer fraud, cyber-stalking and harassment and possession of child pornography. They provide a range of investigatory, search and seizure powers to law enforcement authorities in relation to data and data storage devices.

In addition, the Australian Privacy Principles (schedule 1 of the *Privacy Act 1988* (Cth)) regulates the collection, holding, use and disclosure of personal information that is included in records for government organisations and private organisations with annual revenue greater than $3m and provides penalties for the unauthorised release of personal information (**APP Entities**).

Recently, the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth) has taken these provisions further with an additional mandatory notification scheme for eligible data breaches to take effect from 22 February 2018. A data breach occurs when personal information held by an organisation is lost or subjected to unauthorised access or disclosure. There is an obligation on APP Entities to make a reasonable and expeditious assessment (up to a maximum of 30 days from the time of being aware that a potential breach has occurred) about whether there has been an eligible data breach. As soon as it is practicable afterwards, the entity must prepare a statement about the breach and provide it to the Office of the Australian Information Commissioner. As soon as is practicable after the statement is prepared, the entity must notify the individuals affected by or at risk as a result of the data breach (or, if both are not practicable, publish a statement on its website and publicise). Failure to comply with this regime may result in compensation, enforceable undertakings or civil penalties of up to $1.8m being awarded against the entity.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The key legislation relevant to the ability of the state to access and intercept private communications are the:

- TIA Act which regulates the interception of and access to telecommunications data held by carriers or carriage service providers (**CSPs**) by the state;
- Telecommunications Act which requires that carriers and CSPs provide assistance to relevant agencies for the purposes of law enforcement and national security;
- *Surveillance Devices Act 2004* (Cth) which provides for eligible agencies to obtain warrants to install and use surveillance devices, including data surveillance devices;
- *Australian Security Intelligence Organisation Act 1979* (Cth) which provides the Australian Security Intelligence Organisation with various powers, including the ability to obtain computer access warrants and surveillance device warrants; and
- Crimes Legislation which include various search and information-gathering powers for law enforcement officers, including the ability to access data held in a computer or other data storage device.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The Telecommunications Act requires carriers and CSPs (which include ISPs and VoIP service providers) to ensure that their networks are capable of interception and to prepare annual interception capability plans.

There is an ongoing obligation to disclose to the ACMA any technological changes that would have an adverse material impact on their abilities to fulfil these obligations.

These interception capabilities are mandated with respect to 'communications' – broadly defined to include traditional telephone calls, VoIP calls, emails as well as various other forms of communications.

4.4 How does the state intercept communications for a particular individual?

In accordance to the TIA Act, if a state authority wishes to intercept communications for a particular individual it must first obtain a warrant from a court or tribunal. Such warrant must specify the restrictions imposed such as the time the warrant is in force.

In limited circumstances, such as in emergencies, a warrant is not required. Additionally, there is no obligation for various authorised agencies to obtain a warrant to compel carriers and ISPs to share certain metadata associated with the communications of a particular individual.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Under the Crimes Legislation various law enforcement agencies may obtain an order for certain persons to 'provide any information or assistance reasonable and necessary' to enable an officer to access computer data or a digital storage device that is subject to a warrant and to convert that data into a form that is intelligible.

Such orders can only be made with respect to a person under investigation, an owner of the device, an employee of the owner, a relevant contractor, a person who has used the device, or a systems administrator and who has relevant knowledge of the device or measures applied to protect the data held by the device.

In July 2017, the Government announced plans to impose an obligation on technology companies to provide security agencies

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with access to end-to-end encrypted communications. To date, limited details of this plan have been released.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

2015 amendments to the TIA Act require that carriers and ISPs record and store the following information about a communication:

- the subscriber of, and accounts, services, telecommunications devices and other relevant services relating to, the relevant service;
- the source and destination of a communication;
- the date, time and duration of a communication; and
- the type of communication and relevant service used,

for a minimum of two years. Authorised agencies do not require a warrant to access this information.

The TIA Act also establishes a system of preserving certain stored communications held by a carrier. This must be retained for as long as an authority-issued preservation order specifies.

Under the Telecommunications Act, carriers, CSPs and number-database operators are required to retain certain records for a period of three years in connection with certain disclosure obligations.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Distribution of audio-visual media is primarily regulated by the broadcasting licensing regime established under the BSA. Among other things, the ACMA is responsible for:

- broadcasting spectrum planning;
- allocating and administering broadcasting licences;
- administering cross-media ownership and control restrictions; and
- overseeing Australian content programming requirements applying to certain broadcasting licensees.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Content regulation varies across the distribution platform and is typically characterised by industry self-regulation with discretionary oversight powers by a Commonwealth authority.

Broadcast media

Traditional distribution via television is regulated by industry codes of practice under the BSA, the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth) which provide a range of content, advertising and timing rules and restrictions. Separate industry codes of practice exist in respect of:

- commercial TV networks;
- subscription TV networks; and
- the national broadcasters (the ABC and the SBS).

Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the content industry to comply. Failure to do so then becomes punishable by criminal, civil and administrative penalties.

Online

Online audio-visual distribution is also subject to industry self-regulation. Codes such as the internet and mobile content code and the content services code impose obligations on content hosts, ISPs, mobile carriers and content service providers to, among other things, provide certain information to users, establish complaints procedures and restrict access to certain content.

Film, publications and computer games

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides for the review, classification and labelling of films, publications and computer games prior to sale in Australia but leaves implementation to non-unified state-based legislation.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The BSA makes provision for the following types of licences:

- commercial free-to-air television broadcasting services;
- local and community (not for profit) broadcasting services;
- international broadcasting services delivered from Australia;
- subscription television broadcasting services;
- datacasting services; and
- open and subscription narrow-casting services.

Key obligations vary but will typically involve advertising restrictions, the restriction of certain classifications at particular times and minimum local content quotas.

An important fetter in the Australian media landscape imposed by the BSA have been restrictions on cross-ownership of television, radio and newspaper assets. A person cannot have control (defined broadly) of:

- commercial television broadcasting licences reaching more than 75% of the Australian population (**75% reach rule**);
- more than one commercial television broadcasting licence in a licence area;
- more than two commercial radio broadcasting licences in a single radio licence area; or
- a commercial television licence, a commercial radio licence and an associated newspaper in the one commercial radio licence area (**2 out of 3 rule**).

The Act also requires that there are five independent media operators in a metropolitan commercial licence area and four independent operators in a regional commercial licence area.

In September 2017 the Government secured the passage through the upper house of the *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017* amending the BSA to repeal many of these cross-ownership limitations including the 75% reach rule and the 2 out of 3 cross media control rule to better reflect the contemporary digital media environment. The Bill does not alter the remaining control and ownership rules in the BSA including the 5/4 rule (i.e. that there must be at least five independent media groups in metropolitan commercial radio licence areas, and four such groups in regional commercial radio licence areas, at all times) and platform-specific licence limits (e.g. one-to-a-market rules).

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

At the opposite ends of the spectrum, commercial broadcasting and subscription television broadcasting licences are assignable, while international broadcasting licences are not assignable.

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Datacasting licences and community broadcasting licences are assignable to certain qualified entities; the latter is only subject to certain conditions and with the approval of the ACMA.

Additionally, the BSA provisions relating to media diversity and ownership may prevent licences from being assigned in some circumstances.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Carriage service providers that provide carriage services to the public are covered by the safe harbour provisions in the Copyright Act which defines four categories of eligible activities:

- acting as a conduit for internet activities by providing facilities for transmitting, routing or providing connections for copyright material;
- caching through an automatic process;
- storing copyright material on their systems or networks; and
- referring users to an online location.

The High Court of Australia upheld a decision of the Full Federal Court in 2011 that an ISP was not liable for the alleged copyright infringement of its customers, finding that there was not sufficient detail provided on how the infringement was proven to have occurred and, thus, suspension or termination of customer accounts by the ISP was unreasonable.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Section 115A of the Copyright Act came into effect in June 2015 giving the Federal Court of Australia powers to grant injunctions, by application, requiring carriage service providers to disable access to online locations outside Australia that:

- infringe or facilitate the infringement of copyright; and
- have a primary purpose of infringing or facilitating the infringement of copyright (whether or not in Australia).

The Federal Court granted section 115A injunctions for the first time in late-2016, requiring certain ISPs to block access to a streaming site and four file-sharing sites. A second injunction was granted by the Federal Court to block a peer-to-peer file sharing site in April 2017.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

There are no specific laws on net neutrality in Australia. The nature of Australia's user-pay model of broadband have allowed ISPs to throttle certain traffic to allocate network resources based on a consumer's usage of their data cap. As such, there has been no need for ISPs to set up different traffic lanes and differentially charge traffic. However, ISPs are able to effectively charge different types of traffic through zero rating data usage plans, where certain ISPs have offered consumers access to certain services on a zero ratings basis.

The ACCC has extensive powers in relation to competition and the protection of consumer interests, and can intervene to ensure there is transparency in the traffic management practices of carriers and carriage service providers.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Carriers and carriage service providers are under no obligation to block access to certain sites or content. However, they will have to comply with a section 115A injunction if it is granted by the Federal Court of Australia (see question 6.2 above).

There is no regulation of consumer usage of VPNs in Australia. It is currently unclear if consumer actions to circumvent geoblocking technology breaches the provisions in the Copyright Act on technological protection and access control measures. In the Inquiry report released in December 2016, the Productivity Commission recommended that the Government:

- makes it clear that circumvention of geoblocking technology by consumers is not an infringement of Australia's copyright system; and
- it should avoid international obligations that would preclude the circumvention of geoblocking technology.

Major ISPs will be required to block the INTERPOL "Worst-of" list under current Federal Government Policy in line with the ISPs' statutory obligations in the Telecommunications Act, as it assists law enforcement agencies to enforce criminal law. This power has not been used extensively, however, it has been identified by the Standing Committee on Infrastructure and Communications as a broad and flexible tool.

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Chapter 6

Belgium

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Telecoms, including internet and audio-visual media distribution, are closely intertwined throughout the Belgian market. Most of its key players propose bundled packages and joint offers, creating a convergence between the two sectors.

According to the Belgian Institute for Postal Services and Telecommunications ("**BIPT**") the 2016 turnover for the convergence market amounts to €8.39 billion (+1.4% in comparison to the 2015 turnover).

Furthermore, based on the BIPT last annual report, four companies dominate the market in those sectors:

- Proximus, the incumbent fixed and mobile operator (formerly Belgacom), currently remains the most prominent actor in the Belgian market, with its market share kept between 40–50% of the total turnover generated by the electronic telecommunications and television sectors.
- It is followed by Telenet Group, which comes in second position in the Belgian market, holding approximately 20–30% in market share. It was originally primarily active in Flanders and Brussels, but it is gradually expanding southwards, namely through the acquisition of Base in February 2016, one of the three largest mobile telecoms operators in Belgium, and more recently of SFR Belgium in December 2016, in order to strengthen its position in the Belgian market and to catch up on its principal rival.
- In 2016, Orange Belgium (formerly Mobistar) has made a noticeable entrance on the convergence market, thus bringing back some competition into the Belgian telecoms market, which is characterised by abnormally high prices, in comparison to other countries. Orange Belgium owns a 10–20% market share of the 2016 global turnover generated by the electronic telecommunications and television sectors.
- Finally, the cable-operator trading under the brand "VOO", an economic interest group born from the collaboration between the public cable-operators Brutélé and Nethys (formerly Tecteo), is the main provider of cable broadband services in Wallonia and Brussels. It currently accounts for a 0–10% share of the 2016 turnover generated by the electronic telecommunications and television sectors.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

a) Telecoms sector, including internet

In Belgium, the competence to regulate the telecoms sector is currently retained by the federal state.

The primary piece of legislation governing telecommunications in Belgium is the Law of 13 June 2005 on electronic communications (or 'E-Communications Act'), which brought forth major changes to the former legal regime on telecommunications encompassed in the Federal Law of 21 March 1991 reforming some public economic entities and by implementing the EU-Telecom package, i.e. the various European Directives dealing with telecommunications.

The Law of 21 March 1991 created the BIPT. Then, through the enactment of the Law of 17 January 2003, BIPT became a fully independent Parastatal with a public interest status, mandated to regulate the electronic communications market and the postal sector. This Act was accompanied that same day by another piece of legislation dealing with appeals and disputes arising from the former.

This sector is supplemented by Book XII "Law on the electronic economy" of the Economic Law Code of 28 February 2013.

b) Audio-visual media distribution sector

Due to the federalisation of the Belgian State in 1971, the federated entities have been awarded the competence to regulate the audio-visual media distribution sector. The Dutch-speaking Community passed the Decree on radio and television broadcasting on 27 March 2009 (Dutch-speaking Media Decree). A coordinated Decree on audio-visual media services was enacted by the French-speaking Community on 26 March 2009 (French-speaking Media Decree). Finally, the Decree of 27 June 2005 on radio and television broadcasting applies in the German-speaking Community (German-speaking Media Decree).

The only exception concerns the Bilingual Region of Brussels-Capital, where the Federal State retains the decision-making power. Recently, the Law of 5 May 2017 pertaining to audio-visual media services replaced the Law of 30 March 1995.

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1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

a) Telecoms sector

Mr. Alexander de Croo is the Federal Deputy Prime Minister in charge of telecoms and the digital agenda, while Mr. Philippe De Backer is the Federal Secretary of State in charge of privacy.

BIPT is the telecoms regulator.

The Privacy Commission is also a significant actor of the telecoms sector. It issues recommendations on the application of the Data Protection Law to the digital sector.

b) Audio-visual media distribution sector

In the Dutch-speaking Community, Mr. Sven Gatz is the Minister in charge of media.

In the French-speaking Community, Mr. Jean-Claude Marcourt is the Vice-Minister-President in charge of media.

In the German-speaking Community, Mrs. Isabelle Weykmans is the Vice-Minister-President in charge of culture, including the media.

The competent regulators are the Flemish Regulator for the Media ("*Vlaamse Regulator voor de Media*" or "**VRM**") in the Dutch-speaking Community, the Audio-visual Council ("*Conseil Supérieur de l'Audio-visuel*" or "**CSA**") in the French-speaking Community, and the Council for the Media ("*Medienrat*") in the German-speaking Community.

c) In both sectors

The Belgian Competition Authority ("**BCA**") is an independent administrative authority with a legal personality that contributes to the definition and implementation of competition policy in Belgium, by pursuing anticompetitive practices and reviewing the main merger operations (for instance, the Telenet Group taking over Base). On its own initiative or at the request of a complainant, the BCA investigates any case of distorted competition within a market, regardless of the business in question or the public/private status of the operators.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

a) Telecommunications

In Belgium, the liberalisation of the telecoms sector was put into motion with the Law of 21 March 1991, known as the "Belgacom Act", which authorised the foundation of a new kind of State company enjoying a much larger management autonomy. Henceforth, it thus triggered a full reorganisation of the Belgian telecommunications sector. The liberalisation of the telecoms and audio-visual media distribution sectors became fully official in 1998.

Nowadays, the incumbent operator Proximus still dominates Belgium's telecoms sector, but competition is growing fiercer by the year among the key players.

Furthermore, most of contestants are listed on Euronext and thus open to foreign investment:

- Proximus is State-owned at 53.5%. It currently owns 4.6% of its share. The rest is composed of fluctuating shareholders, 20% of whom are private individuals, whereas the rest is mostly shared among institutional shareholders from the USA, followed by the UK, the BENELUX and France.
- The Telenet Group is owned at 56.54% by Liberty Global, the telecoms and audio-visual media distribution giant. 33.29% of the Group Publicly owned, including 16 Liquidation Dispreference Shares held by Interkabel Vlaanderen CVBA and 30 golden shares held by the financing intermunicipalities Flemish region and its intermunicipalities. The remains of the Telenet Group's shareholding base is composed of Blackrock Inc. (5%), BNP Paribas Investment Partners S.A. (3.27%), employees (0.32%) and share buy-back (1.58%).
- Orange Belgium mostly belongs to the French Orange Group, which owns 52.9% of its shares through its subsidiary Atlas Services Belgium. The rest is otherwise owned by foreign investors (British, Central Europeans, North Americans).
- VOO is a publicly owned cable operator born from a cooperation between Nethys (PubliFin) and Brutélé. As such, it has not been made open to foreign investment.

b) Audio-visual media distribution

In the 1980s, audio-visual media distribution went through a gradual liberalisation of its sector by opening it to new distributors and thus putting an end to state monopolies owned by RTBF and VRT, the incumbent audio-visual media distributors in Southern and Northern Belgium.

However, liberalisation of the sector is still in progress. For instance, the right for foreign distributors to broadcast commercials is still subject to strict authorisations delivered by the competent federated Communities (e.g. the French group TF1 obtained this authorisation in 2017 after about 20 years of negotiations).

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Belgium has been a World Trade Organization ("**WTO**") member since 1 January 1995 and a member of GATT since 1 January 1948. It is a member State of the European Union. All EU Member States are WTO members, as is the EU in its own right.

On 15 April 1997, the European Communities (former name of the European Union) signed the Fourth Protocol to the General Agreement on Trade in Services ("**GATS**") dedicated to telecommunications, thus committing to open basic telecommunications (telephone, data transmission, telex, telegraph, fax, satellite systems and services) markets up to international competition. The Protocol came into force in the Member States (Belgium included) on 5 February 1998.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The E-Communications Act of 2005 sets forth the principle of free provision of electronic networks and services in Belgium as required by the European Authorisation Directive 2002/20/EC. This principle is subject to certain conditions and exceptions (Articles 3 and 4).

One of the most important changes triggered by the EU Telecom Package is that an individual licence or authorisation from BIPT is no longer required to legally provide electronic communications services or networks, except in respect of the allocation of numbers or radio frequencies (see question 2.5 hereinafter). However, operators are still required to officially notify the regulator prior to launching their activities.

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2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

On the one hand, we have BIPT, which is Belgium's parastatal authority that has a regulatory power in the electronic communications market, the postal market, the electromagnetic spectrum of radio frequencies and radio and television broadcasting in the Brussels Capital Region. Within each of these sectors, BIPT has a task to promote competition, to contribute to the development of the internal market and to ensure that consumer interests are protected. BIPT achieved complete independence from the State in March 2015 after the EU Commission pressured Belgium to take the necessary measures against the threats to its regulator's complete autonomy. The Law of 16 March 2015 removes the federal government's right to suspend the regulator's decisions as well as its power to approve or reject BIPT's multi-annual strategy.

On the other hand, there is the Belgian Competition Authority, which is a fully independent administrative authority that contributes to the definition and implementation of competition policy in Belgium, by investigating anticompetitive practices and reviewing the main merger operations. The BCA collaborates with the competition authorities of the other Member States of the European Union and with the European Commission within the framework of the European Competition Network.

The two authorities thus have mostly separate spheres of influence, but their range of action sometimes overlap. For instance, on the one hand, BIPT plays a role in promoting competition in the telecoms, audio-visual media distribution or postal sectors, but the regulatory power to assess and deal with competition issues (e.g. State aids, merger regulation, cartels) is retained by the BCA. On the other hand, some disputes between telecoms operators (pertaining to interconnection agreements and leased lines) fall to the BCA, with the support of the BIPT, which sends a representative to assist in the investigations.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

In accordance with the Act of 17 January 2003 on the appeal and settling of lawsuits arising from the Act of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors, an appeal may be lodged against one of BIPT's decisions before the Brussels Court of Appeal.

BIPT's decisions may only be challenged by an individual or a legal person having a direct interest in the matter, which means that they have to have been concerned by BIPT's decision in the first place.

The higher appeal shall be lodged, on penalty of nullity pronounced automatically, by filing a signed request with the court registry of the Brussels Court of Appeal within a period of 60 days starting from the notification of the decision, or in the absence of such notification, from the publication of the decision, or in the absence of such publication, from the inspection of the decision.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The provision of electronic communication networks and services no longer requires any authorisation from the BIPT. The only remaining requirement concerns the obligation for an operator to send a notification via registered letter to BIPT prior to the beginning of its activities.

The sole exception to what precedes covers the allocation and exploitation of radio frequencies and numbers, which are subject to the assignment of licences from BIPT.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

An operator must notify BIPT prior to offering any public communication networks or services.

The content of the notification is fully detailed under Article 9, § 1 of the E-Communication Act of 2005: identification details; contact person at BIPT; a short but precise description of its services or network; and the date and which activities it will probably begin on.

Filing such a notification is subject to the payment of a fee.

The operator must also inform BIPT of any change to the aforementioned information.

Prior notification to BIPT is not required in the event that:

- The provision of electronic communications services does not occur in the public domain.
- The service provider or reseller provides or resells the service exclusively to a legal person (its client) in which the provider has a majority share.
- The service is provided or resold within the framework of a convention under which the service is made available secondarily and only by way of assistance.

Apart from the obligation to notify BIPT, the provision of electronic communications services does not in itself require any authorisation or licence from BIPT.

The use of numbers and frequencies, on the other hand, is subject to authorisations from BIPT.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The use of scarce resources (frequencies and numbering) is subject to a right of use (licence) under the E-Communications Act and applicable Royal Decrees. These conditions vary depending on the type of resources and the technology. Please refer to section 3 in relation to frequency allocation and to questions 2.18 to 2.20 for numbering.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

In Belgium, operators of telecommunications networks are entitled to execute, at their own expense, all works connected to the establishment and maintenance of their network (e.g. cables and additional infrastructures) on or under the squares, roads, streets, paths, waterways and canals that are part of the public domain; on the condition that the operator respects the laws and decrees governing the public domain and the destination of the public domain.

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The legal provisions regarding the installation of infrastructure and equipment on public and private land can be found in the Law of 21 March 1991. It is completed by provisions from the Law of 25 June 2005 (E-Communications Act), namely concerning the right to gain and share access to infrastructure and equipment of other operators.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

a) Interconnection

According to Article 52, first paragraph of the Act of 13 June 2005, all the operators providing a public electronic communications network must negotiate interconnection agreements in good faith for the purpose of providing publicly available electronic communications services with every operator applying for it.

If parties do not reach an agreement during the negotiations, BIPT is empowered to intervene, either at its own initiative, or at the request of one of the parties involved, in order to secure the policy objectives, which are the promotion of competition in the provision of electronic communications networks, electronic communications services and associated facilities, the contribution to the development of an internal market in electronic communications networks and services, and promoting the interests of users.

b) Access to the infrastructure

The E-Communications Act specifically deals with the issue of granting access to "sites, to infrastructure and to other elements of the network".

As a way to protect the environment, measures have been taken to prevent the construction of more antennae than necessary. Article 26 of the E-Communications Act provides a mandatory consultation of other operators via a Letter of Intention. Before applying for an urban planning permit, each operator has to enquire about the other operator's interests in a common usage of a site. If there is a possibility for shared use of a site, the operators will negotiate a reasonable, proportional and non-discriminatory agreement. The operator owning the site may not deny shared access to the site for reasons which would be deemed unreasonable and discriminatory by BIPT. In the event of a disagreement, BIPT can review the whole negotiation and issue an opinion based on the reasonableness, the proportionality and the non-discriminatory character of the aforementioned agreement.

When these aspects of the negotiation are not complied with, BIPT has the authority to force the owner to grant shared access to the site, so long as the principle of proportionality is respected.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

If, pursuant to the E-Communications Act, the relevant market does not show sufficient signs of efficient competition among its actors, BIPT identifies all operators enjoying a dominant position in that market and submits them to specific obligations deemed appropriate to restore the balance (remedies).

Thus, BIPT forces those significant powers on the market to publish clear and understandable reference offers with a description of the commercial and operational terms, including their access and interconnection tariffs. This information must be freely displayed on the internet, whereas the contracts based on these offers remain confidential.

For instance, it has been assessed that Proximus still assumes a dominant position in many a sector related to electronic communications. As such, it is obligated to publish a reference offer and performance indicators and to clarify its cost accounting system.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The telecommunications and audio-visual media distribution sectors are still seen as lacking efficient competition, and as such must remain subject in Belgium to *ex ante* regulation. Notably, key price controls and transparency, non-discriminatory access and accounting obligations still exist in a number of markets.

For instance, in the framework of the decision of 26 May 2017, BIPT examined the market for call termination on individual mobile networks. Eight operators (Join Experience, Lycamobile, Orange Belgium, Proximus, Telenet, Telenet Group, Vectone Mobile and Voxbone) were presented as companies with significant market power. The main obligation imposed was to reduce the mobile termination rate.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The E-Communications Act provides for an accounting separation obligation. It consists in having accounts in which operations are grouped per relevant market in which a company has significant market power. It is a powerful tool to verify whether the company meets its obligations regarding non-discrimination and to detect possible illegal cross-subsidies. Each year these accounts are verified and approved by BIPT. The legal separation is not addressed, however, in the Act and the functional separation requires an intervention of the European Commission.

In practice, in most cases where BIPT has identified Proximus to be a SMP, it has been required to operate an accounting separation as a way to implement its obligation of transparency and non-discrimination between internal charges.

In July 2017, after having analysed the market analysis issued by the Belgian regulators in July 2017, the Consumer Protection Association "*Test-Achat*" stated that, since telecoms tariffs are rising faster than the cost of living, regulation is highly needed, and as such it suggests to create functional separation of the market with the network management activities on the one hand, and the supply of services on the other hand.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

In an attempt to manage competition in the wholesale broadband and TV market, the CRC (Conference of Regulators of the electronic communications sector, gathering the VRM, the CSA, the Medienrat and BIPT) have called for the further opening-up of networks to include also fixed telephony and make incumbent Proximus provide wholesale access to its FTTH network.

The dominant operators in the market such as Proximus, Telenet and VOO must now offer access to their networks to alternative operators. BIPT has proposed terms such as: non-discrimination,

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transparency and a new pricing model for wholesale access that will still mean operators will face a cost orientation obligation, but cable and fibre networks may only charge fair prices a margin higher than costs, all in order to stimulate investment.

With this change, the CRC is also imposing a geographical application of the regulation. In areas where there are three or more operators offering speeds of more than 30 Mbps, there will be a lighter touch applied to this regulation. The areas will be defined by the regulator, taking into account co-investment by various operators. Also, areas with reduced access to high-speed services will experience reduced regulation in order to stimulate growth in rural areas.

The CRC is also suggesting mandatory wholesale access to EuroPacketCable, which follows the implementation of wholesale access to cable networks in the decision on broadband made in 2011.

The CRC then determined tariffs that cable-operators could bill to the following alternative operators:

- start-up contributions (intended to cover implementation costs incurred by cable-operators);
- line tariffs (owed every time a client leaves a cable-operator for an alternative operator); and
- a "minus" (of 20%–30% according to the situation) applicable on retail tariffs of every cable-operator. Such a "minus" determines what the alternative operator has to pay on a monthly basis to a cable-operator in order to resell its television and broadband offers. The principle of the "retail minus" methodology consists in establishing the price of a wholesale service by reducing the retail service price by a percentage corresponding to certain irrelevant elements.

There are no "regulatory holidays" as such proposed to build fibre access networks in Belgium. However, the E-Communications Act provides that BIPT must allow a reasonable return on investment in order to encourage operators to invest in new-generation networks.

More generally, as mentioned under question 2.9 point b, the sharing of passive infrastructure (such as ducts or poles) is addressed in the E-Communications Act, with some basic requirements ensuring efficiency.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

In a number of circumstances (when a retail market is not competitive and the regulation of the corresponding wholesale services is not sufficient), BIPT can impose measures such as the prohibition to charge excessive prices and other practices, such as wrongfully favouring certain users or unreasonably grouping services.

BIPT does not currently impose retail prices on operators. There used to exist roaming surcharges on the retail prices applied by operators on end-users using their phone/internet package outside their country. However, the EU decided to gradually reduce these surcharges on roaming by setting retail price caps applicable on calls, SMS and finally, data roaming. Finally, since 15 June 2017, the EU has implemented the "*roam like at home mechanism*" and has, therefore, ended roaming surcharges for all people travelling within the EU.

Nevertheless, in its draft decision regarding the analysis of the broadband and television broadcasting markets from 10 July 2017, BIPT states that the broadband television broadcasting markets show high barriers to entry, that there are high concentrations in these markets, and as such that the evolution of the retail price in these markets appears quite unfavourable to the consumer. Therefore, it concludes that retail price controls should be set in order to restore a competitive balance and to increase the consumer's satisfaction in those sectors.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

a) Universal service

According to the E-Communications Act, the provision of electronic communications is subject to the universal service. The services provided under the universal service are:

- the fixed geographic element of the universal service, which consists in the provision to any individual asking for it, independently from its geographical location, of a basic public phone service and of a connection to a public communication network to give and receive phone calls, to transfer data, to have access to the internet;
- the social element of the universal service, which consists in the provision of access to electronic communication to consumers at particular pricing conditions;
- the provision of public phones;
- universal service of directory inquiries; and
- access to the universal phone directory over the whole national territory.

b) Protection of consumers

The provision of electronic communications is also subject to specific rules aimed at protecting consumers as final users.

Generally, prior to entering a contract with any operator, consumers must receive complete information on the operator's identity and address, its financial terms (pricing, invoicing and termination costs), the main characteristics of its services, its way to handle data privacy as well as the terms and conditions to waive the contract, the duration of the contract, the dispute-settlement conditions and how to deal with security breaches.

Furthermore, consumers are generally entitled to free information on operators' tariffs plans in order to compare them and to choose the most profitable one.

Additionally, since the new Telecommunication Act of 10 July 2012, consumers now have the right to terminate and switch from contracts (Internet, television or bundled offers including at least one of these services). Via the "Easy Switch" procedure, consumers may terminate fixed-term contracts (maximum 24-month contracts) free of charges after six months and permanent contracts at any time.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Development and management of the national numbering plan is in the hands of national organisations (in Belgium this is BIPT). BIPT must ensure that equal access to adequate number series is created for each operator, both quantitatively and qualitatively.

Numbers are allocated by BIPT in a transparent and non-discriminatory way.

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2.17 Are there any special rules, which govern the use of telephone numbers?

In its fight against terror, Belgium decided in December 2016 to modify Article 127 of the E-Communications Act in order to put a ban on anonymous pre-paid mobile phone SIM cards by 7 June 2017. By that time, about 400,000 unregistered SIM cards and their adjoined numbers were deactivated.

2.18 Are there any obligations requiring number portability?

The Royal Decree of 2 July 2013 on number portability for electronic communications services subscribers sets number portability as a free, fundamental feature of the telecommunications policy.

Hence, end-users may keep their number while changing operator. Geographic numbers, on the other hand, may only be transferred from one operator to another under the condition that the change occurs within the same geographical zone.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

By virtue of Article 13 of the Act of 13 June 2005 on electronic communications, BIPT is in charge of managing the radio frequency spectrum, examining requests for use of radio frequency spectrum, with the exception of requests destined for radio and television broadcasting, coordinating the radio frequencies, both on a national and international level, and monitoring the use of spectrum.

The three Communities (Flemish-, French- and German-speaking) are responsible for the examination of requests for radio frequency spectrum use destined for radio and television broadcasting.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

BIPT ensures that the spectrum is allocated to candidates based on objective, transparent, non-discriminatory and proportionate criteria.

The BIPT Licensing department grants the licences that are required in accordance with Article 39 of the Act of 13 June 2005 for the use of private radio networks and individual radio stations.

The conditions for obtaining and carrying out the access rights to radio frequencies partially or fully used to relay electronic communications services to the public are set in the Royal Decree of 18 December 2009 on private radio communications and user rights for fixed networks and trunked networks.

The department reviews the applications for authorisations to have and to use a private radio communications station or to set up and run a private radio electrical network. It allocates the frequencies based on necessity, availability and on a "first come, first served basis".

The allocation of the spectrum varies based on the frequency. An auction process is commonly used for the allocation of frequencies to mobile telephony.

The Communities handle the allocation of individual authorisations to use radio frequencies; whereas the Federal state retains the power to allocate frequencies attributed to other services.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Pursuant to Article 39 of the E-Communications Act, no individual or company may hold, install or run a transmitting or receiving radio transmitting device without a prior written authorisation from BIPT. This authorisation is personal and may be revoked by BIPT.

There are, however, some exceptions to that rule. Licence-exempted situations are listed under Appendix 2 of the Royal Decree of 18 December 2009 on private radio communications and user rights for fixed networks and trunked networks.

Finally, authorisations are not required for radio communications stations installed and run by military and public safety services directly from the Justice Department, NATO or the Allied forces.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

According to Article 43 of the E-Communications Act, the use of a radio frequency programme is subject to a fee owed to BIPT in order to cover the costs of controlling respect of the terms and conditions imposed on the operators, as well as making frequencies available to them and giving them the right to use these frequencies.

Licensed radio stations and networks are divided into six categories, in accordance with their destination and the manner in which they operate. The amount charged, therefore, varies based on the category in which the particular use of the radio spectrum has been logged. Appendix 1 of the Royal Decree of 18 December 2009 on private radio communications and user rights for fixed networks and trunked networks defines the amounts owed for each category.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

According to Belgian law, spectrum licences are personal and as such non-transferable. BIPT must be notified at least a month in advance, should a major change occur in the shareholding base and, therefore, in the control of the licensee. Accordingly, BIPT must inform the Minister, who decides whether the conditions under which the licence has been issued are seriously compromised by the change of control. If so, the Minister may propose to revoke the licence. In addition to that, Royal Decrees may, if need be, set specific rules regulating this matter.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

In principle, spectrum licences are personally assigned and, therefore, non-transferable. However, when an operator wishes to transfer or rent out its licence, he must, as a priority inform BIPT about it. BIPT may then authorise the transfer or renting out, as long as it respects the requirements set forth for guaranteeing efficient and successful management of the radio frequency spectrum.

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4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

As a member of the Council of Europe, Belgium entered into the Council's Convention on Cybercrime of 23 November 2001. Belgium implemented the Convention's requirements through the amendment of the Act of 28 November 2000 on cybercrime, which introduced cybercrime into the Belgian Criminal Code, and more specifically the provisions punishing the illegal interception (Article 259*bis*) and unauthorised release (314*bis*) of confidential data and communication, computer fraud (Article 504*quarter*) or the hacking of computer systems (Article 550*bis* and the following).

With the Act of 15 May 2006, Belgium also implemented the requirements of the Additional Protocol to the Convention on Cybercrime of 28 January 2003, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

The government also adopted a grand Cyber Security Strategy in 2012. However, the scope and implementation of its framework remain somewhat limited.

Nevertheless, Belgium does have an established computer emergency response team, CERT.be, and a well-developed cybersecurity incident-reporting structure. Belgium also decided to create a new Cybersecurity Centre (Royal Decrees 10 October 2014).

Finally, the Belgian Cyber Security Coalition, a partnership between players from the academic world, the public authorities and the private sector (i.e. from financial institutions, universities, consultancy companies, professional organisations and government bodies), was established in October 2014, and has since then become a player to be reckoned with in the field of Cybersecurity.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The main legislative framework for intelligence gathering in Belgium is the Law of 30 November 1998 organising the Intelligence and Security Services. Article 18/17 of this Law provides that intelligence services may "listen to, gain knowledge of, and record communications" in order to fulfil their missions.

The Belgian Code of Criminal Investigations (Article 90*ter*) allows investigative judges to "listen to, gain knowledge of, and record" private communications when warranted by certain legally defined circumstances.

4.3 Summarise the rules, which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The E-Communications Act requires that network operators as well as end users be capable of allowing the authorities to "listen to, gain knowledge of, and record" communications.

The Royal Decree of 12 October 2010 requires electronic communications service providers along with network operators to have at all times the technical ability to provide clear and readable (decoded, decompressed and decrypted) copies of communications requested by Belgian intelligence services.

The Royal Decree of 9 January 2003 governing the cooperation of electronic communications providers with judicial authorities, amended in 2011, requires electronic communications service providers and network operators to have the technical ability to provide clear and readable copies of communications requested by Belgian judicial authorities.

The aforementioned pieces of legislation apply to all providers and operators of communication services and networks related to any kind of phone communications, Internet access, emails and public communication networks.

4.4 How does the state intercept communications for a particular individual?

a) Intelligence services

An intelligence service must obtain prior authorisation from a special independent commission before secretly accessing, listening to, or recording private communications. When an intelligence service has obtained the required authorisation to conduct this kind of surveillance on an electronic communications network, it can serve a written demand to the network operator or the service provider, upon which the network operator or service provider is required to give technical assistance to the intelligence service.

b) Judicial investigations

An investigative judge must authorise the communication interception operation by a reasoned ordinance, which must be sent to the Royal Prosecutor. An investigative judge may order anyone who has a particular knowledge of the communication service or, if the communication is protected or encrypted, of the protection and encryption service, to help access the communication in a readable format.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The E-Communications Act grants a freedom of encryption. However, service providers and network operators may not use or make available any form of encryption that would make the content completely unreadable by the authorities.

4.6 What data are telecoms or Internet infrastructure operators obliged to retain and for how long?

The matter of the retention of data by operators is covered by Articles 126 and 145 of the Act of 13 June 2005 on electronic communications and by the Royal Decree of 19 September 2013 implementing Article 126. These texts ensure the complete transposition into Belgian law of the European Directive 2006/24/EC called the "data retention directive".

Operators providing public networks of electronic communications as well as operators providing electronic communications services must retain certain data for a duration of 12 months on pain of legal penalty:

- data allowing the user or the subscriber to be identified as well as the means of communication;
- data pertaining to the access and connection of the terminal equipment to the network and to the service as well as to the localisation of that equipment, termination point of the network included; and
- communication data, content excluded, but origin and destination included.

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5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

See question 1.2 point b.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Content regulation for content broadcast via traditional distribution platforms is far stronger than content regulation over the Internet.

The different Belgian regulators have the authority and the power to regulate the content broadcast via traditional distribution platforms, and in particular to impose a ban on audio-visual media services, which pose a serious threat to public order (i.e. content infringing regulation on the protection of minors, of human dignity or against racism, xenophobia and discrimination), to public health protection, to public safety and to consumers' protection.

The content broadcast on the Internet, however, is far harder to control since the content is not necessarily broadcast from Belgian territory. Therefore, the only option is to get a court order sentencing Internet operators or web hosting providers to block the access to illegal content.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

In Flanders, terrestrial radio broadcasters need to obtain a licence in order to broadcast (Article 134 of the Dutch-speaking Media Decree). If radio broadcasters only transmit via cable or Internet, they simply need to make a declaration to the regulator the VRM (Article 147). Television broadcasters need to obtain a licence only if they broadcast regional television (Article 166); for all other types of television broadcasting, broadcasters are only required to make a declaration to the VRM (Article 161).

In the French Community of Belgium, editors of terrestrial radio services need to obtain a licence, which entitles them to broadcast using a designated frequency. It is the government that designs the allocation scheme and opens calls for applications. Operators that provide radio services transmitted by other means (cable or Internet) are only required to make a declaration to the regulator, CSA. This is also the case for editors of television services that intend to broadcast in the French Community.

In the Bilingual Region of Brussels-Capital, the audio-visual services distributors must send a formal notification, similar to the one required in telecoms matters, to BIPT.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

a) Dutch-speaking Community

A broadcasting licence is personal and can only be transferred to a third party after written approval from VRM.

b) French-speaking Community

Radio broadcasting licences are non-transferable. However, the CSA may allow the exchange of radio frequencies under certain circumstances. Any change in the control of the licensee must be communicated to the CSA within a month of the change.

c) Bilingual Region of Brussels-Capital

No broadcasting licence is required specifically to broadcast in Brussels.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

National courts have tried to impose an obligation of direct supervision on the hosting providers. However, the European Court of Justice gave a clear answer in favour of the Internet providers in two cases (*Sabam c/.Tiscali*, C-70/10, 24 November 2011; *Netlog/Sabam*, C-360/10, 16 February 2012) initially brought in front of the Brussels courts. It confirmed that national courts may not impose a general obligation of direct supervision on hosting providers, namely by forcing them to set up, at their own cost and without any time limit, a general filtering service preventively targeting all users, without infringing the E-Commerce Directive and the freedom to trade.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

There are currently no regulations compelling telecommunications operators and/or Internet service providers to assist content owners whose rights may be infringed by means of file sharing or other activities. The only way to force them to act on these infringements is to compel them with a court sentence.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Since 30 April 2016, a European Regulation (Regulation EU 2015/2120) has been protecting net neutrality in Europe. No connection may be discriminatorily blocked. The Regulation precisely specifies consumer rights in terms of Internet speed and services quality and imposes obligations on the services providers. The only authorised exceptions concern the fight against illegal websites broadcasting xenophobic or heinous content.

The Regulation also provides the consumer with more transparency concerning traffic management and accuracy concerning the actual speed of the Internet provided.

In the event that Internet providers do not respect net neutrality, BIPT plays the role of a police agent of the Internet and has the right to inflict fines on wrongdoers.

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6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

There are no specific rules dealing with blocking websites in Belgian Law. However, this question is debated often.

In 2011, the Court of Appeal of Antwerp ordered a certain number of Internet providers to block a certain number of Domain names belonging to "Pirate Bay" in retaliation for the infringement of intellectual property rights.

Within the frame of the judicial enquiry that followed, all the Belgian Internet providers were then ordered by a judge to block the access to the main domain name "the piratebay.org" as well as to all related domain names. That judge order was eventually confirmed by the Belgian Court of Cassation on 22 October 2013.

Finally, there is currently no regulation or blockage on consumer VPN services in Belgium.

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China

Chen Jinjin

Hu Ke

Jingtian & Gongcheng

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Since its accession to the WTO, China has made tremendous progress in the telecoms, audio-visual media distribution, and internet infrastructure sectors in terms of market liberalisation, revenues, mobile phone and internet penetration rates, and innovation capability. In particular, the government established the China (Shanghai) Pilot Free Trade Zone ("SHFTZ") and relaxed several restrictions on foreign investment in the value-added telecommunications services ("VATS") sector in late 2013. Since the SHFTZ is a pilot zone set up to test reform initiatives that may significantly impact China's relevant markets, the new SHFTZ policies serve as an important signal that shows the government is moving towards liberalising the telecoms industry. In late 2014, three more pilot free trade zones (i.e. Tianjing, Fujian and Guangdong) were established. While Special Administrative Measures (Negative List) on Foreign Investment Access to Pilot Free Trade Zones was published by the State Council in May 2015, which is intended to be applicable to all of the four pilot free trade zones (i.e. SHFTZ, Tianjing, Fujian and Guangdong), the effect of implementing the policies on foreign investment in the telecom sector needs to be further assessed.

China initiated its triple-network (telecoms, internet, and broadcasting networks) convergence process in 2009 and issued the Promotional Program of Triple-network Convergence in August 2015. In May 2016, the Ministry of Industry and Information Technology ("MIIT") issued a Basic Telecommunications Services ("BTS") Licence to China Broadcasting Television and Internet Company (to operate Internet Domestic Data Transmission Services and Domestic Communication Facility Services), which is expected to further promote the triple-network convergence process and the involvement of cable television networks in general telecoms services.

In late 2013, the MIIT awarded 4G licences to three of China's telecoms giants (i.e., China Telecom, China Mobile and China Unicom) to establish 4G mobile networks that would operate under the TD-LTE standard championed by China. In February 2015, the MIIT awarded 4G licences, which would operate under the FDD-LTE, to China Telecom and China Unicom. With respect to basic telecoms infrastructure, on July 15, 2014, the three telecoms giants established the China Iron Tower Company to facilitate the co-construction and sharing of iron towers, base stations, and other basic telecoms facilities.

Telecoms sector and internet infrastructure

In 2016, revenue from the telecoms industry was estimated to be RMB 1,189.3 billion, an increase of 5.6% from 2015. Mobile phone subscribers in China have reached 1.32 billion. China Telecom, China Mobile and China Unicom, which are state-owned enterprises, are the three major players in the telecoms sector.

These areas are not fully liberalised and open to the private sector and are still subject to restrictive conditions for foreign investment. However, as part of the efforts by the Chinese government to introduce private investment into State-dominated sectors, China Telecom has announced that it will initiate a trial of a mixed ownership structure for telecoms business (public capital, private capital and foreign capital). In addition, in 2013, the MIIT issued the Notice Concerning the Implementation of Mobile Communication Re-sales Business, which opens up the mobile communication re-sales business to private capital. So far, the MIIT has awarded MVNO trial approvals to 50 private companies (including JD.com, Suning, Guomei, Xiaomi, and a subsidiary of Alibaba). In early 2016, the MIIT issued two instruments to set forth operational requirements for MVNO operators (e.g. regulating pricing and implementing a real-name system).

Audio-visual media distribution

In 2016, the coverage percentage of radio and television reached 98.4% and 98.9% respectively. The revenue for the distribution of audio-visual content via the internet reached RMB 107 billion (up 135% from 2015). However, broadcasting is still tightly regulated in China. Currently, only the General Administration of Press and Publication, Radio, Film and Television ("GAPPRFT") and certain education administrative departments are allowed to establish radio and television stations. China Central Television ("CCTV") is the largest national television station, but there are over 100 satellite television channels and thousands of local television channels spread throughout the different provinces of China. Youku, iQIYI, Sohu and LETV are the major internet audio-visual service providers.

Foreign shareholding is prohibited in this sector.

(Note: Revenue data sources of the telecoms sector and internet infrastructure are available at: http://www.miit.gov.cn/n1146312/n1146904/n1648372/c5498087/content.html; and audio-visual media distribution data is available at: http://www.stats.gov.cn/tjsj/zxfb/201702/t20170228_1467424.html.)

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1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Chinese government has issued a great number of regulatory instruments in the form of administrative regulations of the State Council, which take precedence in the hierarchy of administrative provisions, and various ministerial rules with respect to these three sectors, including the following principal provisions:

Telecoms and internet

- PRC Telecommunications Regulations (last revised in 2016) ("Telecommunications Regulations"), which sets forth the general principles governing the telecoms market, construction, services and safety, including the internet sector.
- The Classification Catalogue of Telecommunication Services (2015) ("Telecommunications Classification Catalogue"), which contains the classifications of telecom services.
- Measures for Administration of Telecommunications Business Operating Licences (2009) ("Telecommunications Business Licence Measures"), which regulates the granting of, and administration of, telecoms business licences.
- Measures for Administration of Internet Information Services (last revised in 2011) ("ICP Measures"), which regulates the licensing and administration of services providing information via the internet.
- Opinions on Further Opening up Value-added Telecommunication Services to Foreign Investment in the China (Shanghai) Pilot Free Trade Zone (2014) ("SHFTZ Opinions") and Circular on Removing the Restrictions on the Foreign Equity Ratios in Online Data Processing and Transaction Processing Services (Operating E-commerce) in the China (Shanghai) Pilot Free Trade Zone ("SHFTZ Circular"), which set forth the fields to be liberalised to foreign investment and the safeguarding measures required to promote the further liberalisation of VATS within the SHFTZ.
- Cyber Security Law (2016), which regulates the standards, measures for internet environment and infrastructure security.
- Measures on Internet Product and Service Security Censorship (2017), which regulates the internet security censorship activities under internet security censorship committee.

Audio-visual media distribution

- Regulations for Administration of Radio and Television (last revised in 2013) ("Radio and Television Regulations"), which not only regulates the establishment of radio and television stations and the broadcasting and transmission of radio and television programmes, but also works as the fundamental instrument governing the audio-visual media distribution sector.
- Regulations for Administration of Audio-Visual Program Services through Oriented Transmission and Designated Networks (2016), which regulates the transmission of audio-visual programmes through VAN, IP/VPN, or certain oriented transmission channels on the internet in the form of IPTV, designated network mobile phone TV, internet TV, etc.
- Provisions on Administration of Internet Audio-visual Program Services (last revised in 2015), which regulate the transmission of audio-visual content via the internet.
- Interim Provisions on the Administration of Internet Culture Activity (last revised in 2011), which regulates the production and dissemination of "cultural products" (including online games and audio-visual contents) via the internet.
- Regulations for Administration of Network Publishing Services (2016) ("Network Publication Regulations"), which regulates publication activities via the information networks.
- Regulations on Internet-based Live Broadcast (2016), which regulates the users and providers of live broadcast service on the internet.
- Interim Provisions on Internet Advertising (2016), which regulates the internet advertisement service provider, advertisement owner and the issuer.
- Regulations on Internet News and Information Service Management (2017), which regulates the production and dissemination of news and information on the Internet.

Foreign investment in the three sectors is also subject to:

- Catalogue for the Guidance of Foreign Investment Industries (2017) ("FIE Industry Catalogue"), which classifies the industries into either: "prohibited", "restricted", "permitted" or "encouraged" for foreign investment.
- Provisions on Administration of Foreign-Invested Telecommunications Enterprises (last revised in 2016) ("FITE Provisions"), which regulates the establishment of FITEs.
- Opinions on the Introduction of Foreign Capital into Cultural Industry (2005), which provides guidance for foreign investment in China's cultural industry.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The following government authorities are the major industry regulatory bodies:

- The MIIT, which is responsible for the regulation of China's telecoms sector nationwide (e.g., granting of licences in the sector).
- The National Development and Reform Commission ("NDRC"), which has jurisdiction over project approval and pricing for telecoms services.
- The Ministry of Commerce ("MOFCOM"), which has the authority to approve foreign investment projects.
- The State Administration for Industry and Commerce ("SAIC"), which is responsible for industrial and commercial registration for enterprises and for the issuance of business registration licences.
- GAPPRFT, which has jurisdiction over the approval and administration of publication activities (including those via the internet), and over the administration of radio and television broadcasting, transmission of audio and video content, and also content censorship.
- The Ministry of Culture ("MOC"), which has jurisdiction over the cultural industry, including the responsibility for pre-approving online transmissions of "cultural products".
- The State Oceanic Administration ("SOA"), which regulates the laying of underwater cables and pipelines.
- The Ministry of Housing and Urban-Rural Development ("MOHURD"), which has jurisdiction over the approval process for construction and engineering design activities that relate to the telecoms sector.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Foreign investment in these three sectors is subject to varying degrees of restriction.

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Telecoms and the internet

At a national level, the ratio of foreign investment in Foreign Invested Telecommunications Enterprises ("FITEs") must not exceed 49% for the operation of BTS (excluding wireless paging services, very small domestic aperture terminal earth station communications services, fixed network domestic data transmission services, customer premise network services and network hosting services) and 50% for the operation of VATS (including wireless paging services, very small domestic aperture terminal earth station communications services, fixed network domestic data transmission services, customer premise network services, network hosting services, cellular mobile communications services provided by way of resale; and excluding e-commerce activities operated for profit (a subcategory of online data processing and transaction processing services), in which the ratio of foreign investment can reach 100%).

For a FITE that operates BTS services, the "major foreign investor" in the FITE (i.e., the investor who holds the largest investment amount among all foreign investors, accounting for 30% or more of the total contribution of all foreign investors) must hold a licence for operating basic telecoms services in the country or region where it is incorporated. For a FITE that operates VATS service, the major foreign investor must have a good business record and have experience in this area.

To promote reform and opening up to foreign investment, the MIIT issued the SHFTZ Opinions and the SHFTZ Circular, which only apply in the territory of the SHFTZ. They introduce a number of new initiatives that increase participation by foreign investors in the telecoms industry. More specifically, a FITE incorporated in the SHFTZ is authorised to provide:

- six kinds of telecoms services without any restrictions on foreign investment, i.e. the foreign investor can make up to 100% investment in the FITE, including in: (i) application store services; (ii) store-and-forward business services; (iii) call centre services; (iv) internet access services (provision of internet connection services to online users); (v) domestic multi-party communication services; and (vi) online data and trade processing services (operating e-commerce businesses); and
- one kind of telecoms service, subject to restrictions on foreign investment, i.e. domestic internet virtual private network (VPN) services, subject to a 50% investment restriction. All of the above-mentioned services can be provided on a nationwide basis, except internet access services, which are only allowed to be provided to customers within the SHFTZ. With certain exceptions (i.e. facilities used for providing call centre services, and edge routers for domestic internet protocol VPN services, may now also be installed within the Shanghai municipality area, and website acceleration server nodes are now permitted to be set up nationwide where the relevant website constitutes an essential part of the service provider's operation of the licensed VATS), a FITE incorporated in the SHFTZ must locate all its service facilities in the SHFTZ in order enjoy the benefits provided in the SHFTZ.

Audio-visual media distribution

In the context of electronic communications, the distribution of audio-visual content is not open to foreign investment.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

China has been a member of the WTO since December 10, 2001, and has made commitments under the GATS regarding telecommunications as set forth in Annex 9 (Schedule of Specific Commitments on Services) of the Protocol of Accession of the PRC, which includes the Telecommunications Reference Paper. China's WTO commitments are subject to certain restrictions on foreign investment. China has been making significant progress towards a pro-competitive, independent and transparent regulatory mechanism for the telecoms sector.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of electronic communication networks and services is regulated under two broad categories, namely BTS and VATS, in accordance with the Telecommunications Regulations and other related instruments (see question 1.2 above).

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The key governmental regulators at the central level (or their delegates at the provincial level), as applicable, include the MIIT, NDRC, MOFCOM, SAIC, MOC, GAPPRFT, SOA and MOHURD. These authorities undertake responsibilities in their respective jurisdictions (see question 1.3 above).

Among them, three central government agencies are responsible for the enforcement of the Anti-Monopoly Law (2008): (i) the Anti-Monopoly Bureau of MOFCOM; (ii) the Bureau of Price Supervision and Anti-Monopoly of NDRC; and (iii) the Antimonopoly and Anti-Unfair Competition Enforcement Bureau of SAIC. MOFCOM is responsible for examining the concentration of business operators. NDRC and SAIC are both responsible for regulating monopolistic agreements, abuse of market dominance, and abuse of administrative power in limiting competition. Between the two, NDRC is responsible for price-related violations and SAIC is responsible for non-price-related violations.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

In accordance with the PRC Administrative Review Law (last revised in 2009) and the MIIT's Implementation Rules on Administrative Review (2002), specific administrative decisions of the MIIT (such as the MIIT decisions on network interconnection disputes) can be appealed through either administrative review or judicial review. Specifically, one can appeal against the decision of the MIIT's municipal counterparts at the MIIT or at the People's Court in accordance with the Law of the Procedure for Administrative Litigations (last revised in 2014). One can further appeal against

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the decisions of an administrative review of the MIIT through the judicial process if one is dissatisfied with such decisions, or apply for a final decision from the State Council in accordance with the PRC Administrative Review Law.

In principle, an administrative review will give attention to the "lawfulness" and "appropriateness" of the decision whilst a judicial review will be more focused on the "legality" and "fairness" of the case. However, neither procedure is conducted on a "merits review" basis.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Telecoms services in China are subject to two broad licensing categories, "BTS" and "VATS". These two categories are not mutually exclusive. The BTS Licence applies to basic public network facilities, public data transmission and basic voice communication services. The VATS Licence covers telecommunications and information services which utilise basic public network facilities.

The BTS Licence and VATS Licence are further divided into several different sub-categories by business type (such as "fixed communication services" under BTS, and "domestic internet virtual private network services" under VATS) under the Telecoms Classification Catalogue and by regional coverage. The service provider can only operate within the respective sub-categorised scope and within the geographical territory of the licence as it was approved and granted by the MIIT or its provincial counterparts.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

In addition to requirements on technical capabilities, the Telecommunications Business Licence Measures also set forth certain conditions on capital and equity ownership, including that: (i) the applicant must be a lawfully established company, and for a BTS Licence, the company should be at least 51% state-owned; and (ii) the minimum registered capital of the applicant must be RMB 100 million (RMB 1 billion for a cross-provincial business) for a BTS Licence, and RMB 1 million (RMB 10 million for a cross-provincial business) for a VATS Licence. Foreign ownership is subject to additional restrictions under the FIE Industry Catalogue and the FITE Provisions, including the ratio of foreign investment in FITEs (see question 1.4 above). In addition, the registered capital of a FITE incorporated in the SHFTZ must be RMB 1 million or more, which is only 10% of the registered capital required by a FITE (for providing VATS nationwide) under the FITE Provisions.

In practice, the regulatory authorities generally appear to have concerns about, and have imposed a moratorium on approving, foreign investment in the telecoms industry. This is especially true for certain types of businesses, such as for the provisioning of information services through the internet ("ICP") for profit.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

A BTS Licence and VATS Licence will specify the type(s) of permitted operations for the particular telecoms enterprise in line with the categories and classifications under the Telecommunications Classification Catalogue. The duration of a BTS Licence is five or 10 years (depending on the type of business) and five years for a VATS Licence (the duration of a Licence for Pilot Operation of Value-Added Telecommunications Business by Foreign Investors in China (Shanghai) Pilot Free Trade Zone is three years). No transfers or trading of licences is allowed.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Urban construction and construction in villages must include the establishment of corresponding telecoms facilities. BTS operators are generally empowered by the Telecommunications Regulations to lawfully engage in telecoms infrastructure construction without obstruction, with some exceptions for prohibited or restricted areas, as provided by state regulations. After filing the appropriate notice, and making payment for the appropriate usage fees, BTS operators may attach public telecoms facilities to civil buildings (so long as they do not affect the safety of the building).

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

In principle, the Telecommunications Regulations and the Regulations for the Administration of Public Telecommunications Networks Interconnection (last revised in 2014) require that interconnection must be established among telecoms networks on a technically feasible, economically efficient, fair and justified, and mutually collaborative basis.

In particular, "principal telecom service operators" are not allowed to refuse a request for interconnection by other telecoms service operators, and must formulate their interconnection protocols and operate within the scope approved by the MIIT. "Principal telecom service operators" are defined under the law as operators who control vital basic telecoms facilities, who own a relatively large share of the telecoms service market (for the public telecoms networks, this ratio means exceeding 50% of the market for the same type of service within the scope of the local grid), and who are able to exert substantial influence over other telecoms service operators entering the telecoms service market.

According to the Measures for Resolution of Telecommunications Networks Interconnection Dispute (2002), any disputes arising out of network interconnection must be resolved through consultation first. If no agreement is reached, the dispute must be submitted to the MIIT or its provincial counterparts for mediation. If the mediation is unsuccessful, an administrative decision would be made. The administrative decision can be challenged either through administrative review or judicial review.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Telecoms service operators are not statutorily required to publish their standard interconnection agreements or prices, though it is required by relevant regulation that the standard interconnection

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contracts should include certain key provisions, such as, name and address of the operator, the service programme, basic fee charge standard, rights and obligations of the parties, representations of the operator on service quality, etc. Except where interconnection prices are subject to a government-set or government-guided price and, therefore, the price information is publicly available, operators are not obliged to publish actual interconnection prices.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

In general, interconnection prices for public telecoms networks must be in strict compliance with government-set prices as stated in the MIIT's Interconnection Settlement and Relay Costs Allocation Measures between Public Telecommunications Networks (2003) ("Settlement Measures"). However, in exceptional cases, such as for interconnection settlements between "satellite mobile communication networks and other telecommunication networks", the telecoms operator may negotiate interconnection prices by referring to the Settlement Table for telecommunications Interconnection, which is attached to the Settlement Measures. In 2009 and 2013, the MIIT respectively issued the Circular on the Adjustment of Interconnection Settlement among the Public Telecom Networks and the Circular of MIIT on Adjusting Interconnection Settlement Standards among the Public Telecom Networks, which added new settlement standards or replaced certain settlement standards that were provided in the Settlement Measures. In addition, with respect to the settlement standards related to the internet backbone networks which are interconnected through the internet exchange centre designated by the MIIT, the Interconnection Settlement Measures for Internet Exchange Centre (2007) will apply.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Currently, there is no regulation specifically dealing with operators' accounting separation, functional operation, or legal operation. However, the Anti-Monopoly Law may, in theory, potentially provide a legal basis for requiring an operator's functional or legal separation, if the relevant government authority determines that the operator's business may prevent necessary competition in the telecoms market. Historically, the separation of business lines, and the consolidation between key telecoms service operators in China, occurs from time-to-time. For example, this occurred in relation to China Telecom in 1999 when the Chinese government split it into smaller entities.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Presently, existing interconnection and regulatory conditions generally apply to next-generation (IP-based) networks. On January 21, 2010, the State Council promulgated the Overall Plan for Propelling the Integration of Three Networks to promote the construction of "fibre to the home" ("FTTH") and a national broadband network. The MIIT, together with other relevant government authorities, further issued a Notice Regarding Propulsion of Fibre Broadband Network Construction on March 17, 2010, which sets forth certain incentives, including preferential tax treatment, for enterprises engaging in the development and construction of fibre-based broadband networks. In addition, in 2012, the MIIT issued two national standards for the administration of the design, construction, and acceptance of communication engineering for the FTTH programme, including GB50846-2012 and GB50847-2012 ("FTTH Standards"). In May 2015, the Notice of Implementation of Broadband China Program for 2015 was issued. The Notice unveiled several goals for this year, including: (i) extending FTTH coverage by 80 million households and rolling out broadband services to 14,000 administrative villages; and (ii) with regard to 4G, the MIIT has set a target of 200 million new 4G subscribers by the end of the year, and will construct at least 600,000 4G base stations. According to the 2008 Urgent Notice and the 2014 Opinions, telecoms towers, poles, and ducts must be shared (for existing facilities) or co-constructed (for new facilities) by the relevant BTS operators. Other types of telecoms facilities (e.g., optical fibre cables) must be shared to the extent conditions permit. In addition, it has been reported that after the establishment of the China Iron Tower Company, some existing facilities (including base stations, ducts and poles) of the three Chinese telecoms operators may be operated under the China Iron Tower Company.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Before May 10, 2014, telecoms service fees were divided into market-oriented prices, government-guided prices, and government set prices. However, with the implementation of the Circular of the MIIT and NDRC on Adopting Market-oriented Prices for Telecom Service Tariffs on May 10, 2014, telecoms operators are now permitted to autonomously set their telecoms service fees without obtaining regulators' approval.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

In addition to the general obligations imposed on service providers under the PRC Law on Protection of the Rights and Interests of Consumers (last revised in 2013), telecoms service operators must also comply with several telecoms service standards and rules, including the Norms for Telecommunications Services (2005). These rules and standards are mainly intended to regulate the provision of information, non-discrimination of service, communication quality, handling complaints, privacy protection, billing processes, and execution of a written service agreement with consumers. With respect to privacy protection, the Standing Committee of the NPC promulgated the Decision of the Standing Committee of the NPC on Strengthening Network Information Protection in 2012, which contains several specific provisions concerning the acquisition, collection, use, and disclosure of personal information.

In 2012, the MIIT promulgated the Information Security Technology – Guideline for Personal Information Protection within the Information System for Public and Commercial Services ("Personal Information Protection Guideline"). Even though the Personal Information Protection Guideline is not legally binding on network service providers, it represented the current best practices of the

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industry and may potentially indicate likely legislative trends in the future. In 2013, the MIIT promulgated the Personal Information Protection Measures for Telecom and Internet Users, which set forth the methods for telecoms operators and internet information service providers to collect and use personal information, as well as the Measures for Registering the True Identity of Phone Users.

In 2014, the SAIC issued the Administrative Measures for Online Transactions (2014), which provides particular requirements that online sellers, third party online transaction platforms operators, and other parties relevant to online transactions must follow in the online transaction environment.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

According to the Telecommunications Regulations and Measures for Administration of Telecommunication Network Number Resources (last revised in 2014) ("Network Number Resources Measures"), telephone numbers and network identifying codes belong to the State. The use of such number resources is subject to a compensatory use system and requires the approval of the MIIT or its provincial counterparts. Allocation is made by the regulatory authority by way of assignment, random selection, and auction (as applicable).

2.17 Are there any special rules which govern the use of telephone numbers?

According to the Network Number Resources Measures, a number holder must use the number within the prescribed time-frame and comply with the authorised scope and purpose. Allocated number resources may not be transferred or leased. Currently, the three Chinese telecoms operators (China Mobile, China Telecom and China Unicom) are permitted to allocate mobile phone numbers (starting with the digits "170") to the MIIT-approved MVNOs for resale to end-users.

2.18 Are there any obligations requiring number portability?

On May 17, 2014, the MIIT issued the Administrative Measures for Trial of Porting for Mobile Subscribers, which sets out the basic rules (e.g., relevant application and examination, fee and settlement, and supervision and management matters) for porting telephone numbers.

While number portability is not a mandatory requirement for the operators, trial projects for porting telephone numbers have been launched in several areas in China. The MIIT initiated trial projects for porting telephone numbers in the city of Tianjin and the Hainan Province in 2010 by issuing the Circular of the MIIT on Launching the Trial of Porting in Tianjin and Hainan for Mobile Subscribers. Later, on September 20, 2014, trial projects for porting telephone numbers in another three provinces (i.e., Jiangxi Province, Hubei Province and Yunnan Province) were launched.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

In accordance with the Measures for Administration of Radio Spectrum (1993), the Radio Regulatory Bureau under the MIIT ("RRB"), under the leadership of the State Council and the Central Military Commission, is responsible for the management of radio operations (including spectrum use) nationwide. In particular, the provincial counterparts of RRB and the relevant ministries of the State Council are responsible for the administration of civil use of the radio spectrum within their respective jurisdictions. The radio management organisation of the Chinese People's Liberation Army is responsible for the administration of the military's use of the radio spectrum.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

A licence from RRB or its provincial counterparts (as applicable) is required for the use of radio spectrum (spectrum licence) and the user must submit an application to the regulatory authority for approval. Radio spectrum is allotted by RRB on a centralised basis. The relevant government authorities (such as GAPPRFT) may assign the allotted spectrum within its jurisdiction and file these assignments with RRB. RRB and its provincial counterparts are also responsible for granting two types of related licences, a licence to set up and use a radio (station), and a radio transmission equipment licence for the development and importation of radio transmission equipment.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The use of spectrum cannot be licence-exempt.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

China implements a compensatory use system for the use of a radio frequency spectrum. With exceptions for certain types of radio stations prescribed by law, frequency occupancy fees are payable on a yearly basis and must be calculated in accordance with the pricing standards listed in the Fees Collection Regulations for Administration of Radio (1998).

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The Measures for Administration of Radio Spectrum and other related instruments concerning the regulation of spectrum licence do not specifically address rules for circumstances in which a change of control of a licensee occurs. In practice, the spectrum licence will stay valid and no special formalities will need to be followed just because the control of the licensee has changed.

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3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Without approval from RRB or its provincial counterparts, spectrum licences may not be transferred. Spectrum rights are forbidden to be leased either directly or indirectly.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

PRC Constitution Law (last revised in 2004) provides the basis for ensuring the security of private information and communications.

PRC Cyber Security Law (2016) provides in general that the cyber security should be guaranteed by the state and relevant authorities in respect to the internet establishment, operation, service delivery, the infrastructure, information and defines the monitoring and altering mechanism.

Management Provisions on the Computer Information Network and the Internet Security Protection (last revised in 2011) provides that the service providers and individuals have the duty to protect information and data on the Internet.

Provisions on the Computer Information System Security (last revised on 2011) provides the protection mechanism for the computer information system and the public security unit is responsible for the monitoring duty.

PRC Consumer Protection Law deals with cyber security and personal information issues arising out of consumer-operator relations.

Certain provisions in PRC Criminal Law provides the punishment for violating the cyber security laws and regulations.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

According to the PRC Constitution Law (last revised in 2004), the freedom and privacy of correspondences between citizens of the PRC are protected by law. No organisation or individual may, on any grounds, infringe upon the freedom and privacy of citizens' correspondences, except for the needs of national security or for investigations into criminal offences. In response to these needs, public security authorities, or the people's procuratorates, are permitted to censor correspondences in accordance with procedures prescribed by law. In addition, the Counterespionage Law of the People's Republic of China (2014) further provides that where counterespionage work requires, the national security authorities may inspect the electronic communication instruments, appliances, other similar equipment, and installations belonging to any organisation or individual. Moreover, the Telecommunications Regulations also provide that the public security authorities, national security authorities, or the people's procuratorates may conduct an examination of the content of telecommunications in accordance with the law.

In the new State Security Law of the PRC (2015), it is provided that the State must ensure the security and controllability of network and information core technologies, critical infrastructure and information systems and data in key areas. In order to do so, the State has published the Draft Cyber security Law for public comment, and provided regulations for comprehensive cyber security therein.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

There are no specific rules concerning telecoms service operators' interception capabilities currently available in China. However, according to the Telecommunications Regulations, generally, telecoms service operators must meet national security requirements. Particularly, operators are obliged to assist public security authorities, national security authorities, and the people's procuratorates in examining the content of telecommunications in accordance with the procedures prescribed by law for national security or criminal investigation purposes. Given that traditional telephone calls, VoIP calls, and emails can all be included within the meaning of "telecommunication" under the Telecommunications Regulations, the aforesaid operators' obligation of assistance will cover traditional telephone calls, VoIP calls, and emails.

4.4 How does the state intercept communications for a particular individual?

The ways and technical solutions that the State may apply to intercept communications for a particular individual are not publicly known.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

To strengthen the administration of commercial encryption, and to ensure the safe flow of information over the internet and through other media, the State Council and the State Encryption Administration Bureau ("SEAB") promulgated a series of instruments concerning the regulation of scientific research relating to the production, sale, use, import/export, transfer, repair and even the destruction of commercial encryption products. The regulations include the Regulations on Administration of Commercial Encryption (1999) ("Encryption Regulations"), the Regulations on Administration of Use of Commercial Encryption Products (2007), and the Measures on Administration for the Use of Encryption Products by Foreign Entities and Individuals in China (2007), which specifically relates to the use of encryption products by foreign entities and individuals in China.

When a foreign entity or individual applies to use commercial encryption products in China, the type of algorithm (such as "AES") and length of the key, together with other information of such commercial encryption products, must be provided to the relevant provincial SEAB for approval.

PRC Anti-Terrorism Law (2016) provides that telecom business operators and Internet service providers who provide encryption services or solutions to their users should provide the relevant decryption technology and other technical assistance to the public security organs and the state security organs for the prevention and investigation of terrorist activities.

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4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

According to the Norms for Telecommunication Services, telecoms service operators are required to retain original information on the fees charged for fixed, mobile, IP phone calls, peer-to-peer text messaging services and internet information services for at least five months. On July 12, 2013, the MIIT issued the Norms for Internet Access Services, which state that the original information on the fees charged for Internet access services must be kept for at least five months. In addition, the Measures for Registering the True Identity of Phone Users requires that the identification information and materials provided by subscribers when they subscribe to telecoms services must be kept for at least two years after the subscriptions are terminated. On May 19, 2015, the MIIT published the Administrative Provisions on Text Message Services, in which it is provided that text message service operators must record the following information in their service systems for at least five months: sending and receiving time; telephone numbers or codes of the sending and receiving ends; user subscription and un-subscription information; and the content of messages (for port-type messages). Under the ICP Measures, ICP operators must keep records of the content and publishing times. Internet access providers must keep records of the log-in/out time, user account, IP address of users and initiating numbers for at least 60 days.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Generally, in the context of electronic communications, the distribution of audio-visual media is under strict control by the Department of Propaganda of the Communist Party and GAPPRFT.

Depending on the nature of the carrier or platform used for transmission, the distribution of audio-visual media is subject to different licensing systems (see question 5.3 below), which are primarily administered by GAPPRFT in accordance with the relevant instruments concerning the distribution of audio-visual media (see question 1.2).

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

In general, the same content regulation principles will apply to the distribution of audio-visual media. For example, illegal or immoral content, such as that which "threatens national security, honour, or interest", or that is otherwise restricted by law or administrative regulations, shall not be distributed either via traditional distribution platforms (e.g., TV, radio and film) or via the internet. No matter whether transmitted via traditional platforms or the internet, the contents of advertisements distributed must all satisfy the rules provided in the Advertising Law of the People's Republic of China (last revised in 2015).

In the meantime, in order to distribute content via different platforms, a distributor may need to apply with different administrative authorities for different licences or permits (as discussed in question 5.3).

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

To distribute audio-visual content through radio and television, a broadcaster (radio or television station) must obtain a Radio and Television Broadcasting Institution Licence and a Radio and Television Channel Licence granted by GAPPRFT. Only films, television dramas or animations, domestically produced or imported, which have obtained GAPPRFT approval for distribution in China (e.g., Television Drama Distribution Licence) are allowed. When delivering the content, the broadcaster must also ensure copyright issues have been resolved.

To engage in the distribution of audio-visual content via the internet, an operator must at least obtain three types of licences, including the MIIT's ICP Licence (applicable to for-profit audio-visual content), GAPPRFT's Operating Permit for Transmission of Audio-Visual Programs via Information Networks (in which the permitted business type, receiving terminal and transmission networks are specially prescribed), and MOC's Internet Cultural Operating Licence. If it involves certain specific business activities, additional licence(s) may be required. By way of example, for network publication activities, GAPPRFT's Certificate for Network Publication must also be acquired. And for delivering content involving any political news or commentaries, a licence from the State Council Information Office is necessary. Internet audio-visual media operators must comply with self-censorship obligations that are similar to those applying to broadcasters, in order to ensure the legality and morality of the content they deliver. If an operator notices that the content transmitted is "restricted information", it must terminate the transmission of the information, keep records, and report it to the relevant regulatory authorities immediately.

To engage in the distribution of audio-visual content, through VAN, IP/VPN, or certain oriented transmission channels on internet in the form of IPTV, designated network mobile phone TV, internet TV, etc., an operator must also obtain GAPPRFT's Operating Permit for Transmission of Audio-Visual Programs via Information Networks (in which the permitted business type, receiving terminal and transmission networks are specially prescribed).

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

All the licences mentioned in question 5.3 are administrative licences, and Article 9 of the PRC Law on Administration of Licensing (2004) specifically provides that administrative licences obtained in accordance with laws must not be transferred, except where laws or regulations permit such a transfer according to the conditions and procedures prescribed by law. Therefore, the licences mentioned in question 5.3 are not assignable, either because it is expressly prohibited by certain regulations (e.g., the Telecommunications Business Licence Measures), or the relevant regulations do not provide that such a transfer of licences could be made.

Generally, when the equity structure of certain licence holders is changed, approval from the government authorities issuing such licences should be obtained prior to any equity changes (e.g., for an ICP Licence), or the alteration formalities with relevant competent government authorities shall be fulfilled (e.g., for MOC's Internet Cultural Operating Licence). More importantly, if change of control of the licensee happens, the various restrictions imposed on foreign investment in the telecoms, internet, and audio-visual media sectors must be strictly complied with (see questions 1.1 and 1.4 above).

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6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

According to the Telecommunications Regulations, telecommunications users are responsible for the content they transmit via the use of a telecommunications network. The Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law on Trial of Civil Dispute Cases of Infringement of Information Network Transmission Right (2013) also provides that an ISP will not be jointly liable with the infringer if it only provided automatic access and automatic transmission services for the infringing content. Many Chinese courts appear to have adopted this rule and have applied the defence of "mere conduit" when determining the responsibility of internet access service providers for content carried over their networks. The benefits of safe harbour rules are available to ISPs, provided that they comply with certain statutory requirements. However, generally, ISPs do not have an obligation to actively monitor infringing content on their networks, with certain exceptions.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

According to the PRC Tort Law (2010) and the Regulations on the Protection of the Right to Network Dissemination of Information (last revised in 2013), ISPs are obliged to take necessary actions, including deleting or blocking infringing content or disconnecting the links, when they are fully aware of the infringement, or after being duly informed by the aggrieved content owner. In the case of receiving notification from the content owner, ISPs must duly inform the person providing the content in question either by forwarding the infringement notice or by publishing the notice on the information network (where the network address of the intended recipient cannot be identified). The ISP is also obligated to disclose the identity of the infringer to the aggrieved party.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Generally, telecoms service operators are required to ensure "fairness" and equality when delivering services under the Telecommunications Regulations. In addition, the PRC Price Law (1998) does not permit operators to implement price discrimination policies against other operators that provide similar services. Therefore, the operators are legally unable to differentially charge for different types of traffic over their networks. However, there is no requirement for the operator to respect "net neutrality" in China, and in practice occasionally operators charge differently certain traffics.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

If telecoms service operators discover that the content being transmitted is illegal or immoral (e.g., endangering national security or divulging state secrets), they must cease the transmission and block access to certain sites or content immediately.

The operation of VPN services requires either a Fixed Network Domestic Data Transmission Service Licence (a type of BTS Licence) or a Domestic Internet Protocol Virtual Private Network Service Licence (a type of VATS Licence). Customers can use certain VPN services which are permitted by the respective VPN service licences mentioned above.

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Denmark

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The Danish telecoms market is characterised by strong competition between 137 telecoms providers, large and small network owners, as well as MVNOs.

With a population of 5.7 million, mobile penetration in Denmark stands at 144%. Currently, there are 24,200 antenna positions in Denmark, which is set to double in 10 years. Competition on the mobile market is fierce, and the price of a mobile subscription has decreased by more than 70% in the last 10 years.

With the spreading of mobile subscriptions and VoIP, landline (PSTN) penetration has correspondingly decreased to a level of 10%. Internet penetration as landline broadband is currently at a level of 42%. The Danish government has stated a goal of achieving 100 Mbit/s download speed and 30 Mbit/s upload speed to all in 2020. Today, 84% of the Danish population has access to 100 Mbit/s download and 83% has access to 30 Mbit/s upload speed.

The telecommunications industry is a material sector in Denmark, with 13,000 employees and an annual turnover of 5.1 billion EUR which is 1.9% of the Danish BNP.

The telecommunications market is dominated by TDC A/S ("TDC"), Telenor A/S ("Telenor") and Telia Denmark, *filial af Telia Nettjänäster Norden AB, Sverige* ("Telia") as the main network owners and telecommunications providers. However, many MVNOs are also present in the telecommunications market.

The most important broadcast companies are the national broadcasting companies: DR; and TV2. Other privately owned foreign broadcasting companies providing TV in Denmark are: TV3 (TV3+, TV 3 Puls) owned by the UK-based Viasat (part of the MTG group); and Channels 4, 5 and 6 which are owned by the Discovery Networks Northern Europe Ltd.

Both the telecoms and the broadcast industries are open to foreign investments.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) The most important Danish regulations governing the operation of electronic communications networks (telecoms networks) and the provision of electronic communication services (telecoms services) are:

- the Act on Electronic Communications Networks and Services, Act No. 128 of 7 February 2014, (the "Tele Act");
- the Executive Order on the Provision of Communications Networks and Services, Executive Order No. 715 of 23 June 2011, (the " Tele Order");
- the Act on Radio Frequencies, Act No. 1100 of 10 August 2016, (the "Frequency Act");
- the Act on Cable Laying Access and Expropriation, etc. for Telecommunications Purposes, Act No. 662 of 10 July 2003, (the "Cable Laying Act");
- the Act on the Establishment and Joint Utilization of Masts for Radio Communications Purposes, Act No. 681 of 23 June 2004, (the "Mast Act");
- the Executive Order No. 482 of 20 May 2016 regarding Universal Service Obligations, (the "USO Order");
- the Executive Order No. 988 of 28 September 2006 regarding retention of data, (the "Retention Order"), which has since been amended by the Executive Order of Amendment No. 660 of 19 June 2014;
- the Act on the Center for Cyber Security Act No. 713 of 25 June 2014 (the "Cyber Security Act"); and
- the Network and Information Security Act, Act No. 1567 of 15 December 2015 (the "Network and Information Security Act").

(b) The most important Danish regulations governing media, including radio and TV broadcasting, are:

- the Consolidated Act on Radio and Television Broadcasting, Act No. 255 of 20 March 2014, (the "Radio and TV Act"); and
- the Act on Copyright, Act No. 1144 of 23 October 2014, (the "Copyright Act").

The rules on advertising in the Danish Radio and TV Act are supplemented by the general rules in the Danish Marketing Practices Act No. 426 of 3 May 2017 (the "Marketing Practices Act"), as well as special sector rules on e.g. the advertising of healthcare and alcohol products on television.

(c) The internet sector is subject to the telecoms regulation, see (a) above; however, the telecoms regulation does not cover content. Content is regulated in the Danish E-Commerce Act, Act No. 227 of 22 April 2002 (the "E-Commerce Act") and the Danish Consumer Agreements Act, Act No. 1457 of 17 December 2013 (the "Consumer Agreements Act").

Also, matters relating to the administration of domain names are regulated by Act No. 164 of 26 February 2014 (the "Internet Domain Act").

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1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) The Danish Energy Agency ("DEA") and the Danish Business Authority ("DBA") are the regulatory supervisory authorities for the telecoms industry in Denmark.

Other government bodies relevant to telecoms providers are:

- the Danish Competition and Consumer Agency which works together with the DBA when significant market positions ("SMP" status) are established and in relation to merger control;
- the Danish Data Protection Agency (the regulatory agency) together with the DBA which supervises data protection matters relating to the telecoms industry; and
- the Center for Cybersecurity, which is responsible for warnings about cyberattacks and counter cyberattacks, and also covers the regulation and supervision of network and information security in the telecoms sector.

The Danish Consumer Ombudsman supervises some of the requirements under the Tele Order, e.g. regarding subscription binding periods. The Danish Consumer Ombudsman's main area is, however, supervision with the Marketing Practices Act, which regulates consumer matters, such as pricing, marketing, etc.

Many telecoms providers are members of the private organisation, The Telecom Industry Association (in Danish: "*Teleindustrien*"), which constitutes a forum for the development of private industry agreements on, e.g., joint digging for establishing telecoms networks, procedures regarding net-neutrality, co-operation with the authorities in relation to requests for DNS blocking, etc.

(b) The Danish Ministry of Culture and the Radio and Television Board (the "RTB") are the main regulators within the field of media (Broadcasting).

(c) Internet content matters are subject to private prosecution or to some extent the Danish Consumer Ombudsman.

The Danish internet domain .dk is delegated to and managed by DIFO which is a private non-profit organisation. Matters related to domain names are handled by the Complaints Board for Domain Names.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The Danish telecoms infrastructure sector became fully liberalised in 1997. There are no rules restricting direct or indirect foreign ownership interests in telecoms companies in Denmark. Neither are there any rules limiting media investments, cross-media ownership or foreign ownership of media companies in Denmark.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Denmark has been a member of the WTO since 1995. In 1998 Denmark, as part of the EU, committed to the fourth protocol of the GATS concerning basic telecommunications services, and, thus, also to the telecoms reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

In Denmark, the regulation regarding the provision of telecoms networks and telecoms services is quite extensive. However, the main framework regulation is the Tele Act.

The Telecom Order is rooted in the Tele Act and forms the material regulation regarding the provision of telecoms networks and services to end-users.

The Frequency Act holds the regulation regarding the issuance and administration of frequency licences.

Also, the Cable Laying Act and the Mast Act are relevant in terms of planning network infrastructure.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The DEA and DBA are the two main regulatory supervisory authorities for the telecoms industry in Denmark. The DEA is the main responsible authority for the telecoms sector, responsible for, amongst others, regulation of international roaming domain aspects, the Danish numbering plan, masts and universal service obligations for providers, etc., whereas the DBA is responsible for the regulation of competition in the telecoms market as well as the aspect of data protection in the telecoms market.

The DBA and the Danish Competition and Consumer Agency work together to establish the relevant telecoms markets and which telecoms providers hold SMP status. The Danish Competition and Consumer Agency, as well as the DBA, are under the field of responsibility of the Ministry of Business and Growth and both are the responsibility of the Minister for Business and Growth.

The DEA is under the field of responsibility of the Ministry of Energy, Utilities and Climate and consequently the responsibility of the Minister for Energy, Utilities and Climate.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions made by the DEA and the DBA (in relation to its telecommunication responsibilities) may be appealed to the Telecommunications Board of Appeal (in Danish: "*Teleklagenævnet*"). Decisions by the Telecommunications Board of Appeal may be appealed to the regular courts, i.e. the High Court.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

There are no requirements for general or individual authorisation to provide telecommunications services in Denmark; however, a provider of telecommunications is required to register with the Danish Police.

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2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

See question 2.5 above.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

See question 2.5 above, as well as question 2.16 and section 3, relating to number allocation and spectrum licensing.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

According to the Cable Laying Act, the DEA may allow expropriation to be initiated for the purpose of laying cables for public telecoms networks. Also, network operators are to give access to their passive physical infrastructure (e.g. ducts, manholes) to operators intending to roll out high-speed broadband networks on fair and reasonable terms and conditions.

Regulations relating to access to existing or new masts, antenna positions or buildings are set out in the Mast Act, e.g. the DEA may allow expropriation for the purpose of ensuring access to use areas in which masts or antenna systems can be established for radio-communications purposes.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Under the Tele Act, all telecoms providers of public telecoms networks or services shall have a right and an obligation to negotiate agreements with each other on the exchange of traffic.

Moreover, telecoms providers with SMP status may be obligated to meet all reasonable requests for establishing or modifying interconnection agreements from other telecoms providers.

To the extent necessary to ensure connection between end-users in individual networks, the DBA may decide that certain obligations, including in justified cases the obligation to interconnect their networks, shall be imposed on telecoms providers that control access to one or more end-users.

The DBA may solve an interconnection dispute by imposing a legally binding decision.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Under specific market decisions, operators with SMP status on the relevant market may be required to make public their standard interconnection contracts and be subject to price control. Currently, the following requirements for standard offers and price controls exist on these four Danish markets:

- **Market 1**: Wholesale call termination on individual fixed telephone networks; 38 companies, TDC amongst them, all have SMP status and several requirements have been imposed. TDC is both required to make public its standard interconnection contracts and subject to price control. The remaining 37 companies are all subject to price control.
- **Market 2**: Wholesale voice call termination on individual mobile networks; Hi3G, Lycamobile, Mundio Mobile, TDC, Telenor and Telia have SMP status, and are all subject to price control.
- **Market 3a**: Wholesale local access provided at a fixed location; only TDC has SMP status, and is in that respect required to make public its standard interconnection contracts and subject to price control.
- **Market 3b**: Wholesale central access provided at a fixed location for mass-market products; only TDC has SMP status, and is in that respect required to make public its standard interconnection contracts and subject to price control.

Furthermore, and based on specific discussions with the DBA, TDC has voluntarily entered into a *data-only solution* regarding their cable TV network, which allows other providers certain access to TDC's cable TV network. The DBA will monitor this solution's competitive effect closely until new market decisions are put into place but has decided for now to not issue a specific decision hereon due to the solution reached.

Also, the DBA has issued a draft market decision on the market for the "*retail market for access to the fixed telephone network*" and "*wholesale call origination in the fixed telephone network*", which will govern the transition phase of the market from being regulated, to not being regulated.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The main rule is that charges for interconnection and/or network access are subject to negotiation between the parties. However, telecoms providers with SMP status may be subject to price control regulation and shall thus provide its services at cost-related prices; see question 2.10 above regarding the specific markets.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

No, not under the current market decisions, *cf.* question 2.10 above.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Cf. also question 2.8, network operators are required to give access to their passive physical infrastructure (e.g. ducts, manholes) to operators intending to roll out high-speed broadband networks on fair and reasonable terms and conditions. In terms of what conditions such access must be given on, the Cable Laying Act sets out that these shall be fair and reasonable terms and conditions, including price.

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Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

See question 2.10 above.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The provision of telecoms services to consumers is subject to specific rules in the Tele Order, together with more general consumer protection regulation.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The DEA draws up and administers an overall Danish numbering plan comprising numbers, number series and addresses to be used in connection with the provision of telecoms networks or services.

Numbers, number series or addresses will, as a main rule, be assigned to any telecoms provider who requests to be assigned numbering resources.

2.17 Are there any special rules which govern the use of telephone numbers?

The Tele Act contains regulations regarding the use of telephone numbers.

2.18 Are there any obligations requiring number portability?

The telecoms providers shall ensure that end-users are able to retain their subscriber numbers when changing between telecoms providers. The telecoms providers cannot claim any payment for portability services. In fact, the telecommunications industry has agreed on fixed compensations to end-users in case of delayed portability.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The DEA is the authority regulating spectrum use.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The use of radio frequencies requires a licence. Licences are issued by the DEA successively as applications for licences are received. If the DEA ascertains that scarcity exists for a specific frequency, the DEA will hold a public tender or an auction as a basis for issuing licence(s) over the scarce frequency band.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Certain use of frequency spectrum may, as an exception, be made licence-exempt. The conditions for such use are regulated in a specific executive order on the use of radio frequencies without a licence.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The DEA requires an annual licence fee which consists partly of a usage charge and partly of a fixed spectrum charge. Also, the previously held auctions have included material licence lump-sum payments.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Licences may be transferred without obtaining previous approval from the DEA. The DEA shall, however, be informed of the transfer and the new licensee immediately after the transfer has taken place.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Licences may be traded, i.e. sold, wholly or partly. Also, licences may be sub-licensed and assigned for security. A sub-licence or an assignment for security, as opposed to a transfer, does not require any notice to the DEA, nor is such information registered with the DEA.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The regulation regarding a telecoms provider's obligation to retain telecommunications data is set out in the Tele Act, the Tele Order, the Retention Order and the Network and Information Security Act as supplemented with a number of Executive Orders. Finally, the Center for Cybersecurity Act allows for the Center for Cybersecurity to, in some instances, intercept data from companies or governmental authorities who have been linked up to their security service, without obtaining a warrant, if such interception regards information security.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The regulation regarding a telecoms provider's obligation to retain telecommunications data is set out in the Tele Act, the Tele Order and the Retention Order. This joint regulation describes the telecoms provider's obligation to make telecommunications data available to the police as well as how to maintain required security levels. The criminal proceeding requirements applicable, in respect of when the police may obtain a court order to intercept or obtain retained historic telecommunications data, are set out in Act No. 1255 of 16 November 2015, (the "Administration of Justice Act").

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4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Under the Tele Act, a telecoms provider to end-users shall ensure that the telecoms network and services are set up in such a way that the Danish Police can obtain access to historic telecommunications traffic and intercept current data. The provisions of the Tele Act in this regard, are technology neutral, and do not as such set out whether they cover any of the above mentioned types of communication.

The more specific regulation on data retention is set out in the Retention Order which is further explained in Guidelines No. 74 of 28 September 2006, (the "Retention Order Guidelines").

The requirements under the Retention Order apply to telecoms providers and to end-users. Consequently, the Retention Order applies both to providers of internet services, as well as providers of mobile or landline services, and for network, as well as content providers, as long as the provision of electronic communication services is for end-users, as opposed to sale on retail basis to other providers.

4.4 How does the state intercept communications for a particular individual?

Only the Danish Police may obtain access to historic telecommunications data or wiretapping. Access requires the presentation of a court order to the telecoms provider.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are no specific rules requiring encryption. However, telecoms providers are required to ensure an adequate level of protection of personal data by "appropriate technical and organisational security measures to protect personal data". Consequently, if encryption is customary for the type of data processing, i.e. electronic communication, encryption would be required.

The data retention regulation does, however, hold some regulation on encryption. In relation to a police court order for data, interception/wiretapping or retained historic telecommunications data, it is the provider's obligation to ensure that the relevant data are available to the police. It is, however, the police's own responsibility to remove encryption from the provided data. Nevertheless, if the provider has a system which uses encrypted data as an integrated part of it, the provider must ensure that data provided to the police is accessible to the police in a non-encrypted form.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Generally, the telecommunications traffic data to be retained under the Retention Order consists of data on caller/user identity and time and beginning of a communication. Furthermore, location data, provided the data are generated or processed in the telecoms provider's network, must be retained. The requirements under the Retention Order do not entail a requirement to register the content of the exchanged information.

The retained data shall only be retained for one year, unless there are other legal reasons for retaining the data longer, including personal data protection regulations.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The most important Danish regulations governing media, including radio and TV broadcasting, are set out in the Radio and TV Act and the Act on Copyright.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

The Radio and TV Act governs the transmission of audio-visual media over traditional platforms and visual media over the internet or other electronic communications networks. The regulation for these types of media is, therefore, the same, irrespective of the distribution platform. The same regulation applies to on-demand audio-visual media, even though content regulation for on-demand visual media differs on one point compared to the traditional platforms. On-demand media may in some cases broadcast media that may result in a serious degree of damage to the physical, mental or moral development of minors, if the broadcasted media is sufficiently marked, while traditional audio-visual broadcasters may generally never distribute such media.

It is worth noting that the transmission of pure audio media over non-traditional radio networks, whether as linear or on-demand content, is not governed by the Radio and TV Act. Therefore, the specific rules regarding content and advertisement are not applicable to pure audio media not broadcasted over traditional distribution platforms, and such services are only governed by the general rules contained in, amongst others, the Marketing Practices Act and the E-Commerce Act.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The Statutory Licence to Provide Programme Services:

The Radio and TV Act provides the public service undertakings DR and TV2 with a statutory licence to provide programme services. Nevertheless, the statutory licence only applies to the public service activities. Programme services which fall outside of the public service activities require a separate licence or registration.

Licence/Registration:

As a main rule, the provision of programme services for other enterprises than DR and TV2 requires either a licence or registration with the RTB. A licence is mainly only required if the programme services require access to scarce spectrum resources; otherwise a mere registration suffices. Licences are issued by the RTB subject to a tender.

A licence is not required for programme services provided via satellite or cable network where no frequency scarcity exists. Accordingly, enterprises that provide programme services via these platforms only have to register with the RTB.

Provision of programme services on the digital platform (digital terrestrial network) require a licence from the RTB. However, the licence to administer the broadcasting possibilities on the digital platform has, subject to a previous tender, been awarded to a single enterprise, who acts as a distributor (the so-called "Gatekeeper"). The Gatekeeper is an intermediary between the providers of

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programme services and the end-users. The individual programme service providers hereafter enter into commercial agreements with the Gatekeeper to provide digital programme services.

In cases where a licence is required from the RTB, a licence must similarly be obtained from the DEA under the Frequency Act. However, with regard to frequencies specially reserved for broadcasting purposes, the DEA may issue a frequency licence on the mere fact that a broadcasting licence has been issued under the Radio and TV Act.

Key Obligations:

Some licences contain requirements in relation to: minimum hours of news and magazine programmes per year, excluding advertisements; the provision of news from Denmark and abroad; that the news broadcasts shall be carried out by an independent news desk; and that a certain percentage of the productions must be Scandinavian, etc. Additionally, licence holders must pay an annual concession fee and an annual variable fee depending on their turnover. Such conditions vary depending on the type of broadcasting.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

As a main rule, no prior approval has to be obtained from the RTB in connection with a transfer of the licence or a change of control over the licensee, unless otherwise provided directly in the licence.

Some licences contain terms with a prohibition on assignability or change of control, which could trigger a filing or approval obligation. The Radio and TV Act does not contain a description of the substantive test which will be applied by the RTB in relation to an assignment of the licence or a change of control of the licensee. The decision made by the RTB will thus be discretionary and based on an overall assessment of several elements. Nevertheless, the decision must be in compliance with general administrative law principles and based on objective and fair arguments, such as changes in financial circumstances.

It should also be noted that all changes in matters stated by the licensee in the application for a licence or a registration, shall be notified to the RTB. This also includes information of assignment and ownership changes, provided that the RTB has been informed about the ownership in connection with the application/registration.

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6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

A 2010 ruling from the Danish Supreme Court in the so-called "*Pirate Bay* case" stated that telecoms providers may be required to DNS block websites which contain or provide access to copyright infringing material, as the telecoms providers alternatively will be considered accessories to the copyright infringement taking place on the website.

Similarly, telecoms operators may be ordered to DNS block unlicensed gambling websites subject to Act No. 119 of 22 January 2016 (the "Gambling Act").

The Telecom Industry Association has decided that telecoms operators will only react to a court order for DNS blocking and will not carry out any DNS blocking based solely on requests from right holders.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

See question 6.1 above.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The Tele Act has a section on net neutrality which authorises the DEA to regulate matters relating to net neutrality, unless the telecommunications industry prepares industry principles on the matter.

The Telecom Industry Association has in this connection established a net neutrality forum which has set out the following four principles for net neutrality:

1. The end-user has the right to internet access with a declared capacity and quality.
2. The end-user has the right to access legal content and use applications and services of his/her own choice, provided such services and applications do not affect net integrity.
3. The end-user shall have access to transparency, i.e. the end-user shall be able to obtain information on which relevant traffic control mechanisms an internet provider uses.
4. Internet providers shall not discriminate certain providers of services, content or applications.

Thus, the DEA has chosen not to regulate net neutrality by law. However, in April 2016, a new EU Regulation on net neutrality entered into force, which is directly applicable in Denmark. Consequently, the Telecom Industry Association's principles are expected to be construed in accordance with the new EU Regulation.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

See question 6.1 above.

Consumer VPN services are not regulated under Danish law. However, if the VPN service is used to circumvent a restriction on a geographical market to access unlicensed content, it may conflict with a consumer's contract with e.g. Netflix and, at worst, constitute a copyright violation.

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Torben specialises in business and technology transfers, primarily in the IT and Telecommunications sector, handling telecommunications matters, including Dispute Resolution. Torben became a partner in 2001.

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Torben advises private equity funds, industrial and other clients on mergers and acquisitions – particularly within technology, contributing his industry knowledge and commercial insight to ensure accurate identification and efficient management of risks.

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Alexander's work has involved several transactions, investments and regulatory matters, and has primarily been focused on M&A, deals involving technology, and IT businesses. Besides advising clients on M&A and commercial contracts, he has provided advice to clients on highly detailed regulation such as Danish and European telecommunications regulation and use of personal data, for instance with regard to Big Data.

Alexander has written articles on several regulatory and practical matters, including data security, alternative sources of financing (such as crowdfunding), and telecom regulation.

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Finland

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The Finnish market for telecoms, internet and audio-visual media distribution is fairly competitive, although new actors rarely enter the market.

(a) In 2016, telecoms operations generated a turnover of approximately EUR 3.5 billion. Of this, slightly more than half were accumulated from mobile networks and one-third from fixed networks.

The biggest telecommunications companies are Elisa Oyj, Telia Oyj and DNA Oyj.

(b) In 2016, the turnover from TV and radio networks was approximately EUR 0.4 billion.

Key broadcasting companies are the state-owned Finnish Broadcasting Company Oy, Sanoma Oyj and Bonnier Ab.

Digita Oy and DNA Oyj own the infrastructure and hold licences for terrestrial television networks. The largest cable television network operator is DNA Welho Oy, a part of DNA Group.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Information Society Code (917/2014) regulates telecoms networks and services, television and radio broadcasting, telecoms and radio equipment, and planning and usage of radio frequencies.

The Information Society Code, together with the Personal Data Act (523/1999) and the Penal Code (39/1889), governs confidentiality and information security in electronic communications. The Act on Audiovisual Programmes (710/2011) sets down provisions for age limit classification of audio-visual programmes.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The telecoms regulation in Finland falls within the responsibilities of the Ministry of Transport and Communications. Certain decisions are reserved for the Government. The Finnish Communications Regulatory Authority (FICORA) is an independent authority under the Ministry and is responsible for supervising communications markets.

The Finnish Competition and Consumer Authority (FCCA) monitors competition restrictions and matters relating to consumer protection.

The Finnish National Audiovisual Institute is the national authority for the supervision and classification of audio-visual media and the co-ordination of media education.

The major self-regulatory bodies are the Council for Mass Media, the Council of Ethics in Advertising and the Ethical Committee for Premium Rate Services.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Both telecoms and audio-visual media distribution markets are liberalised and open to foreign investment.

The Finnish authorities can also exercise control over the ownership of companies considered essential in terms of the security of supply and national security. The Ministry of Economic Affairs and Employment monitors foreign corporate acquisitions under the Act on the Monitoring of Foreign Corporate Acquisitions in Finland (172/2012). In the non-military sector, the monitoring targets Finnish enterprises considered critical for securing vital functions of society. Should key national interests so require, the Government can restrict the transfer of influence to foreigners and to foreign organisations and foundations.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Yes, Finland has been a WTO member since its establishment in 1995 alongside the EU. The EU, and Finland as its Member State, have given commitments regarding telecommunications services,

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including the telecoms reference paper which has been appended to the schedule of commitments. The reference paper and the relevant EU legislation have been implemented in Finland.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Finnish legislation in the field of telecoms is based on the EU legal framework. The Information Society Code governs the provision of communications networks and communications services. The telecoms regulations apply primarily to 'telecommunications operators', who are either network operators or service operators. Under the code, FICORA has been empowered to issue technical regulations. Its duties also include the economic regulation of telecommunications. Telecoms legislation is based on the principle of technology neutrality. Telecoms operators are also subject to general competition and consumer legislation.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

General telecommunications guidance and development are the responsibility of the Ministry of Transport and Communications, including preparing legislation in the field of telecoms. FICORA supervises compliance with the Information Society Code and issues regulations under it. FICORA also ensures effective competition within telecoms, but is required to cooperate with the European Commission when carrying out market definitions and analyses and when imposing obligations on operators with significant market power. The authority to grant licences and allocate frequencies resides primarily with FICORA and in some instances the Government.

Communications markets are also under the scrutiny of the FCCA by virtue of the general legislation governing competition and consumer protection. FICORA and the FCCA make their decisions independently from the Government and its political decision-making processes.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The decisions of FICORA are appealable. The competent court depends on the subject matter of the decision; as a main rule, decisions are appealed to one of the regional Administrative Courts. Decisions relating to, e.g., imposing obligations to operators having significant market power are appealed to the Supreme Administrative Court. FICORA's decisions relating to the prohibition of an unfair agreement term are appealed to the Market Court. The decisions can be appealed both on the merits and on procedural grounds.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

A network licence is required to provide a network service that uses radio frequencies in a digital terrestrial mass communications network or in a mobile network practising public telecommunications. FICORA, and in some instances the Government, have the general authority to grant such licences. Licences are granted by comparative procedure or auction.

The provision of public telecommunications (for example, as a mobile communications network operator, internet service provider, cable network operator and a radio programme service carrier) requires that a telecommunications notification be submitted to FICORA.

The provision of other types of telecoms services does not require a licence or a notification.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Telecommunications operators have a number of obligations under the Information Society Code. The obligations are summarised in a confirmation letter provided by FICORA to all operators who file a telecommunications notification. The obligations include *inter alia* interconnection obligations, a duty to maintain information security in electronic communications and networks' and services' functionality, and a duty to prepare for exceptional circumstances. A telecoms operator subject to a notification duty or a licence must pay an annual supervision fee (the information society fee).

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Network licences are granted by FICORA or the Government either by auction or in a comparative procedure for a fixed period of up to 20 years. Licences are non-transferable, and they may be cancelled if the effective control in respect of the licence holder changes. However, an internal transfer of a licence between a parent company and a wholly owned subsidiary is allowed. Further, the licence holder may request a preliminary ruling on whether a licence would be cancelled due to a contemplated transfer. As an exception to the above, an auctioned licence can be leased in full or in part with the Government's permission.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The Land Use and Building Act (132/1999) and the Information Society Code contain provisions that allow the installation of telecommunications cables and related minor equipment, structures and installations on property owned by another. If no agreement is reached with the owner, the local building supervision authority may make a decision to allow the installation.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The Information Society Code stipulates that a network operator has an obligation to negotiate in good faith on interconnection with

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another network operator. FICORA may impose interconnection and access obligations on a network operator with significant market power. In more exceptional situations, interconnection and access obligations can be mandated also on an operator that does not have significant market power. Access and interconnection regulations are in line with the relevant EU directives.

Operators can refer violations of the Code to FICORA, which aims to resolve any disputes primarily through mediation. If mediation is unsuccessful, FICORA resolves the matter within four months. The time limit does not apply to unusually extensive cases.

If the parties do not agree on the details of the interconnection, an operator, under an interconnection obligation set by FICORA, is obliged to follow the default rules on interconnection as set out in the Information Society Code.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

FICORA can impose an obligation on a telecoms operator to publish its terms and prices regarding interconnection and network access. Fifty fixed network operators and four mobile network operators with significant market power are subject to such a duty regarding termination to fixed or mobile networks, respectively.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

FICORA has imposed price regulation on operators with significant market power in the wholesale markets of mobile termination, fixed network termination, access to fixed networks (local loops), wholesale broadband access (bitstream), leased lines and broadcasting. Depending on the market, the operators have to apply non-discriminatory and/or cost-oriented pricing. FICORA uses the fully distributed current cost methodology. FICORA has set *ex ante* maximum prices for mobile termination and for leasing antenna sites on broadcasting masts. The decision to impose maximum prices on local loops was overruled by the Supreme Administrative Court. FICORA has the power to impose retail minus price regulations and fair and reasonable prices, but has not yet exercised these powers.

In addition, FICORA has the power to decide on a maximum price when assessing *ex post* whether an obligation to observe cost-oriented pricing has been followed, and has also exercised this power.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

FICORA has required several operators having significant market power to employ accounting separation. Thus far, no decisions have been made to mandate functional separation. FICORA cannot mandate legal separation.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

FICORA has imposed obligations to fixed network operators with significant market power to grant access to both copper and fibre local loops and bitstream services. Access to cable TV networks is not regulated.

FICORA can mandate access to passive infrastructure. Currently, access obligations are imposed on SMP operators regarding equipment, co-location facilities for local loops and antenna sites on Digita's digital terrestrial television network.

The Act on Co-building Network Infrastructure (276/2016) mandates telecoms, electricity, transport infrastructure and water supply operators to share and co-build passive infrastructure.

A national state aid scheme was launched in 2009 for the rollout of high-speed broadband networks in sparsely populated rural areas. In July 2017, the scheme was extended to other areas where commercial rollout is not viable. The networks built under the scheme must provide all operators access to the network for a period of seven years and access to ducts and poles for an unlimited period.

There are no 'regulatory holidays' for high-speed networks.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The retail markets are competitive and no operator has been defined as having significant market power in retail markets. Therefore, no retail price controls have been imposed on operators on the basis of their significant market power. However, operators assigned as universal service providers for either telephony or broadband services are required to offer the universal service at a reasonable price.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The Information Society Code contains provisions relating to users' rights. These are compulsory in B-to-C contracts. The rules include, *inter alia*, minimum content of the communications service agreement, rules on termination of the contract, restrictions on fixed-term contracts and tie-in sales, standard compensations in case of fault or delay and itemisation of the bill.

The universal service regulation ensures that all consumers and businesses are entitled to obtain a functioning telephone subscription and a broadband subscription of 2 Mbps to their permanent place of residence or to their place of business. The universal service must be available at a reasonable price and within a reasonable delivery time and can be provided with any technology, including mobile. FICORA has assigned several universal service operators (USO) in areas where the service offering is insufficient on a commercial basis.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

FICORA grants rights to use numbers and identifiers on application. Numbers and identifiers are distributed in a manner that treats telecoms operators and other persons as fairly as possible, taking into account the nature and extent of operations. FICORA must make the numbering decision within three weeks, or where the

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number has exceptional economic value, in six weeks from receipt of the application.

2.17 Are there any special rules which govern the use of telephone numbers?

FICORA's numbering regulations lay down the type of numbers and identifiers that may be used in telecommunications and the purpose for which they are to be used. FICORA can impose conditions to the use of numbers where it is necessary to ensure the clarity and efficiency of numbering or the benefits of users. FICORA charges numbering fees for the granted numbers.

The Consumer Ombudsman may order a telecoms operator to close a number if the service seeks unlawful financial benefit by providing users with essentially false or misleading information in marketing material.

2.18 Are there any obligations requiring number portability?

Number portability is mandated and it must be free of charge to the subscriber. The operator can, however, collect from the other telecoms operator a one-off payment if the technical process of porting the number generates one-off costs. The one-off payment cannot be so high as to deter the use of the service. In individual cases FICORA can decide on a maximum amount of the one-off payment.

Numbers cannot be ported between fixed and mobile networks. The validity of a fixed-term communications service agreement concerning the telephone number does not release the operator from the number portability obligation.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

FICORA oversees the use of radio frequencies in Finland and grants licences. The Government decides upon spectrum auctions and major network licences.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

There are two types of licences: network licences (see question 2.5); and radio licences, that include technical usage conditions.

A network licence is needed for the provision of network services in a mobile and a digital terrestrial mass communications network. These licences are granted by the Government or FICORA. Most of these licences have been granted in comparative 'beauty parades'. Since 2009, all new spectrums for mobile use (2.6 GHz, 800 MHz and 700 MHz) have been auctioned.

The possession and use of a radio transmitter requires a radio licence, unless the equipment is separately exempted from licensing. Radio licences are granted mostly by FICORA. If granting a radio licence could have a significant effect on the general development of the communications market, the licence is granted by the Government. Radio licences are granted on a first-come, first-served basis. If radio licences cannot be granted to all applicants due to the insufficiency of radio frequencies, the licence must be granted on virtue of a 'beauty parade' to those applicants whose operations best promote the aims of the Information Society Code. Radio licences connected to a network licence are granted to the network licence holder.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Licence-exempt radio transmitters and the frequencies on which they can be used in Finland are listed in FICORA's Regulation No. 15. Being exempted from licensing requires that the equipment is operated on the frequencies allocated to its purpose of use and it meets technical and other requirements. A licence is not needed for receivers.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The network licences for mobile and digital terrestrial television networks granted by comparative 'beauty parades' carry a market-based spectrum fee. The amount of the fee depends on multiple factors, including: the frequency amount allocated to the licence holder's network; the technical and financial utilisation of the frequency band; and the population coverage and the intended use of the frequencies. The annual market-based spectrum fee is approximately EUR 1.2 million per mobile operator. From 2024 onwards, market-based spectrum fees will also apply to the military use of spectrum.

As for auctioned network licences, the licence fee is the winning bid. The licence fee is paid in annual instalments during the licence period.

A frequency fee is collected on all radio licences granted by FICORA. The frequency fee is defined according to the usability of the frequencies in the radio licence. For short-term radio licences, the frequency fee is calculated based on how long the frequencies are used.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The change of control provisions apply to network licences.

The change of control must be notified immediately to the Government, which can either accept the change of control or cancel the licence within two months of the notification. The Government accepts the change of control if it is apparent that the requirements for granting a licence are met and operations will continue according to the licence terms.

The licence holder can request a preliminary ruling on the matter, to be given within two months of the application. If the change of control must be filed to the competition authorities, the two months' time frame will be calculated from the merger clearance decision.

All rights and responsibilities linked to the licence are transferred to the new licence holder. Along with the network licence, the related frequency reservation or radio licence will also transfer. The transfer of the radio licence must be immediately notified to FICORA.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Network licences granted by 'beauty parades' can only be transferred within the same group of undertakings. In case of auctioned mobile network licences, the Government can transfer a licence at the

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request of the licence holder, provided it has no especially weighty reasons to suspect that the transfer might prevent competition or endanger interference-free radio communications or apparently risk national security. The decision will be given within two months of the reception of a transfer application. It is possible to transfer only a part of the frequencies included in the licence.

Sub-licensing or leasing of network licences granted by 'beauty parades' is not allowed. A mobile network licence granted by auction can be leased, subject to Government approval. Upon the licence holder's application, the Government may approve the lease within two months of the arrival of the application, provided it has no especially weighty reasons to suspect that the leasing would apparently risk national security. The licence holder continues to be responsible for the licence obligations.

Radio licences can be transferred. However, the transfer of a radio licence may be prohibited in the licence terms if the use of the radio transmitter requires a proficiency certificate or if the licence transfer would have a significant effect on the general development of the communications market. The transfer must be notified without delay to FICORA. FICORA may reject the transfer of a radio licence within a one-month period if it is obvious that the requirements for granting a radio licence are not met.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The central provisions on electronic communications and information society services are compiled in the Information Society Code (917/2014). The Code also contains regulations on managing information security and interference, transmitting emergency calls and authoritative messages as well as preparations for emergency circumstances. Telecoms operators must plan how the continuity of their operations is secured in the exceptional circumstances referred to in the Emergency Powers Act (1552/2011) and in other disruptive situations.

Chapter 9 of the Emergency Powers Act provides for ensuring the availability of electronic information and communications systems and the availability of postal services. The Ministry of Transport and Communications may obligate a telecoms operator to certain actions in case of emergency/extraordinary circumstances to secure the operation of electronic information and communications systems and prevent information security threats against them.

The European Parliament adopted the Directive on Security of Network and Information Systems (2016/1148, NIS Directive) on 6 July 2016. On 4 October 2016, the Ministry of Transport and Communications established a working group to support implementation of the NIS Directive. The working group published its final report on 20 April 2017, and it proposed that the obligations under the Directive should be established as part of the relevant national sector-specific regulations.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The main legislative provisions are governed by the Information Society Code and the Coercive Measures Act (806/2011). Criminal sanctions for non-compliance with the Code have been set out in the Criminal Code (39/1889, as amended).

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Such requirements have been set out in the Information Society Code. The Code provides that a telecommunications operator must equip its communications network and communications service with technical instruments and features that allow the interception of electronic communications and telecommunications monitoring as referred to in the Coercive Measures Act, the Police Act, and the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.

4.4 How does the state intercept communications for a particular individual?

Communications interception is regulated under the Coercive Measures Act. Further, the Police Act authorises the police to use tele surveillance and metering of telecommunications for reconnaissance purposes.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are no specific rules governing the use of encryption.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

A service operator obliged to submit a telecommunications notification must ensure that data generated or processed in connection with the provision of publicly available electronic communications services, or of public communications networks, are retained for a period set out below. Such data may be used only for the purposes of investigating, solving and considering charges for criminal acts subject to the Coercive Measures Act.

The retention obligation under the Information Society Code applies to data related to: (1) a telephone service or SMS service provided by an operator under the retention obligation, including calls for which a connection has been established but the call remains unanswered or is prevented from being connected due to network management measures; (2) an internet telephone service provided by an operator under the retention obligation, meaning a service provided by a service operator enabling calls that are based on internet protocol through to the end customer; and (3) an internet access service provided by an operator under the retention obligation. The data of the services referred to above in (1) must be retained for 12 months, the data of the services referred to in (3) for nine months, and the data of the services referred to in (2) for six months. The data retention time starts with the time of the communications.

In services referred to above in (1) and (2), the retention obligation applies to the name and address of a registered user or a subscriber, subscription identifier and data that can be used to identify a communications service user or communications according to the type, receiver, time and duration of communications, including call transfers. With regard to the services referred to above in (1), the retention obligation applies to data that can be used to identify the device used and the location of the device and the subscriber connection it uses in the beginning of communications. With regard

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to the services referred to above in (3), the retention obligation applies to the name and address of a subscriber and registered user, subscription identifier, installation address, and data that can be used to identify the communications service user, the device used in communications and the time and duration of the service. The data to be retained must be limited to what is necessary for identifying the facts referred to above, with due consideration to the technical implementation of the service.

The retention obligation does not apply to the contents of a message or traffic data generated through the browsing of websites.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The main legislative act governing television network operations and broadcasting of television and radio programmes is the Information Society Code. The Ministry of Transport and Communications and FICORA act as the main regulatory bodies, supervising and regulating the field, as well as issuing network and programme licences.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Due to the technology neutral policy adopted in the legislation, content broadcasting via any technology is subject to the same legislation.

The must-carry obligation applies only to cable television and IPTV network operators. These operators have an obligation to transmit public service television programmes and related ancillary and supplementary services without charge.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

Operating television or radio network services in the digital terrestrial mass communications network requires a network licence (see question 2.5 above). The network licences include conditions, e.g., on minimum network coverage and transmission technology to be used.

The broadcasting of television and radio programmes in the terrestrial mass communications network requires a programme licence. Programme licences are granted by 'beauty parades' and the licences may broadly stipulate the type of content to be broadcast. FICORA collects a yearly supervision fee from licenced broadcasters.

Operating television network services or broadcasting television programmes in the cable, satellite and IP networks does not require a licence. However, broadcasters established in Finland must submit a notification to FICORA when they provide television broadcasting not subject to a licence, video-on-demand audio-visual services or linear pay-television services in a terrestrial digital mass communications network using a protection decoding system.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

A programme licence granted for television or radio broadcasting cannot be assigned to another party. If the licence holder assigns the licence to another party, the licensing authority will make a formal decision confirming that the licence has become void. An internal transfer of a licence within a group between the parent company and a wholly owned subsidiary is permitted. Such a transfer must be notified immediately to the licensing authority.

If the effective control with regard to a licence holder changes, the licensing authority may approve the changes or cancel the licence. Any transfer or change must be notified immediately to the licensing authority. The licence holder can request a preliminary ruling on the matter. The licensing authority must decide the matter within two months of reception of notification or application.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

In recent years, there has been at least one preliminary injunction case where a lower court in Finland considered that the hosting service provider exemption defence was available for a rating service provider as the provider did not monitor the hosted user-generated content. In addition, the Supreme Court of Finland has considered copyright infringement in a peer-to-peer file-sharing network in the Finreactor case (Supreme Court Decision 2010:47). The court held that the administrators could not benefit from the exemption from liability for hosting services because they had participated in the provision of the service and copyright infringement by administering torrent descriptor files, etc. In August 2017, District Court of Helsinki prohibited the administrators of online sharing platform The Pirate Bay from continuing to communicate copyright-protected works to the public (District Court of Helsinki Decisions 17/43107 and 17/43115).

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Under the Copyright Act (404/1961, as amended), courts may order a service provider to surrender the contact information of a subscriber who makes infringing material protected by copyright available to the public. Further, courts may order an injunction to discontinue against a service provider whose services are used to make copyright-infringing material available to the public. Several ISPs in Finland have been ordered to block access to certain domains and IP addresses by such injunctions.

In addition, courts may order the service provider to prevent access to material infringing copyright or a neighbouring right when an injunction order is not available for the reason that the copyright infringer is unknown. Such order is valid for a maximum of 12 months at a time.

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6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The EU Regulation 2015/2120 on open internet access is directly applicable in Finland.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

The Act on Preventive Measures Relating to Distribution of Child Pornography (2006/1068) sets up a system with the purpose of preventing access to foreign websites containing child pornography. Under the Act, the police have set up a list of pages containing illicit material that telecommunications operators are entitled to, but not required, to use to block access to those sites by their IP address.

In addition, ISPs can be required to block access to content or sites by court order under the Act on the Exercise of Freedom of Expression in Mass Media (460/2003) regarding content, the distribution of which to the public is a criminal offence or for infringement of an intellectual property right.

Consumer VPN services are not directly regulated in Finland.

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France

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(a) The telecoms sector

According to the INSEE (French National Institute of Statistics and Economic Studies), the electronic communication services retail market represented around €36 bn in 2016.

While this market has been said to be in decline over the last six years, the statistics of the 1st semester 2017 published by the French national electronic communications and postal regulation authority (*ARCEP*) show that revenues stemming exclusively from electronic communication services have increased by 0.7% in one year.

Orange, SFR-Numericable, Bouygues Telecom and Free Mobile are among the significant actors of this sector.

(b) The audio-visual media distribution sector

In France, the audio-visual media distribution sector has a twofold market: the audiovisual production market; and the audio-visual distribution one. Significant market participants are TF1, France Télévisions, Canal+ and M6.

On an individual basis, the four major actors reported they had raised the following annual revenues in 2016: TF1 – €2,062 bn; Canal+ – €5,252 bn; France Télévisions – €2,510 bn; and M6 – €1,278 bn.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) The telecoms sector

Historically, the legal regime applicable to the telecoms sector has mainly emerged from Law n° 90-1170 of 29 December 1990 and Law n° 96-659 of 26 July 1996.

As a result of the successive 2002 and 2009 European Union reforms ("Telecoms Package 2 and 3"), this regime was amended in 2003, 2004 and 2011 (Law n° 2003-1365 of 31 December 2003; Law n° 2004-575 of 21 June 2004; Law n° 2004-669 of 9 July 2004; and Order n° 2011-1012 of 24 August 2011).

Recently, the French legislator has adopted two laws that have several provisions directly dedicated to the regulation of telecommunications (Law n° 2015-990 of 6 August 2015; and Law n° 2016-1321 of 7 October 2016).

Law n° 2016-1321 has embedded the net neutrality principle as established and regulated by the Regulation (EU) n° 2015/2120 of 25 November 2015 and assigned powers to the ARCEP to defend it.

All these provisions have been codified in the *Code des Postes et des Communications Electroniques* (*CPCE*).

The Internet benefits from specific legal provisions which notably result from Law n° 2009-669 of 12 June 2009, Law n° 2004-575 of 21 June 2004 (called LCEN) and Law n° 2016-1321 of 7 October 2016.

(b) The audio-visual media distribution sector

The rules applicable to the audio-visual media distribution sector are principally contained in Law n°86-1067 of 30 September 1986 on Freedom to Communicate which has been recently amended by Law n° 2017-86 of 27 January 2017 (the Law strengthens the powers of the *CSA* in order to promote diverse representation through audio-visual communication services).

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) The telecoms sector

As radio frequencies are public domain goods, their effectation and management are entrusted to a public administrative body, the National Agency of Frequencies (*ANFR*) under the supervision of the Ministry of Industry.

The *ARCEP* is an independent administrative authority whose main objective, amongst others, is to control the use of frequencies and ensure the compliance of telecoms operators with the telecommunications regulation.

(b) The audio-visual media distribution sector

The *CSA* is an independent administrative authority responsible for allocating frequencies to audio-visual distribution operators and, more generally, for supervising them while conducting their activities.

(c) The regulators in both sectors

The Data Protection Authority (*CNIL*) is the authority responsible for controlling personal data processing and, in general, information technologies to make sure they do not infringe individuals' rights.

The High Authority for the Distribution of Works and the Protection of Copyright on the Internet (*HADOPI*) is an institution exclusively dedicated to the dissemination of creative works and protection of intellectual property rights on the Internet.

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The Competition Authority (*AdlC*) is also a significant actor of both sectors, since it oversees compliance of telecoms and audio-visual distribution operators with competition rules, sanctions anticompetitive practices and controls merger operations.

The government has significant influence over the regulation of both the audio-visual and telecoms sectors via the Prime Minister (*PM*), the Ministry of Economy, Industry and the Digital Sector (for the telecoms sector) and the Ministry of Culture and Communication (for the audio-visual sector).

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(a) The telecoms sector:

(i) The telecoms sector has been liberalised through the adoption of several laws in the 1990s (e.g. Law n° 90-1170 of 29 December 1990; Law n° 96-659 of 26 July 1996).

(ii) As a general principle, financial relationships between France and abroad are free (Article L.151-1 of the Monetary and Financial Code (CMF)).

Exceptions to the applicable law are however provided for foreign investments that are related to sensitive activities, such as activities involving encryption means or services, intercepting communication devices and activities relating to the integrity, security and continuity of electronic communication services and networks (Article R.153-2 of the CMF). Any foreign investment that covers such activities is subject to prior approval by the Minister of the Economy in accordance with the procedure set out in Article L.151-3 of the CMF.

Investors that do not fulfil this requirement may face civil and criminal sanctions (the nullity of the transaction; for natural persons, five years of imprisonment and a fine up to twice the amount invested in the operation; for legal persons, fines will be up to five times this amount).

(b) The audio-visual media distribution sector:

(i) The State's broadcasting monopoly ended with the adoption of Law n° 82-652 of 29 July 1982.

(ii) Article 40 of Law n° 86-1067 of 30 September 1986 provides for restrictions on foreign investments within the audio-visual sector. Except if provided otherwise by international agreements, authorisation for a French-language terrestrial radio or television service shall not be granted to a company in which more than 20% of share capital or voting rights are held, directly or indirectly, by persons of foreign nationality. Subject to the same limitation, no person of foreign nationality may carry out acquisitions that directly or indirectly bring the share of capital held by foreigners to more than 20% of the share capital or voting rights at meetings of a company holding such an authorisation.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

As a member of the European Union (*EU*), France is a World Trade Organization member since 1 January 1995.

The *EU* has made commitments to facilitate competition in telecommunications services, whether cross-border supply or consumption abroad (GATS/SC/31.Suppl3).

France especially implements the regulatory principles spelled out in the "Reference Paper". For instance, France complies with the principles of independence of regulatory authorities (e.g. the *ARCEP*).

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Telecoms activities are to be freely exercised, provided they are subject to prior notification to the *ARCEP* (Article L.33-1 of the CPCE).

However, the use of radio frequencies and numbering resources may require prior approval (see question 2.5).

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The *ARCEP* is the regulatory authority. In charge of participating in national and international law-making, it is also empowered to allocate resources (radio frequencies and numbering) as well as to control the implementation of the telecoms regulatory framework. In this regard, the *ARCEP* has the ability to impose sanctions against operators in case of infringements and, if necessary, to settle disputes arising between them.

The main function of the *AdlC* is to control anticompetitive practices, especially concentrations, including giving expertise in the functioning of markets. It aims to ensure the free play of competition.

Like the *ARCEP*, the *AdlC* has advisory and decision-making powers. They both assist the government by giving opinions.

Since *ARCEP* has the authority to settle disputes that might give rise to competition issues, the competences of *ARCEP* and *AdlC* may come into conflict with each other. In such a situation, interaction between the two authorities is needed and they may consult with one another for obtaining opinions in their respective area of expertise.

As independent administrative authorities, they both enjoy independence from the government (Article L.130 of CPCE (for the *ARCEP*); Article L.461-1 of the Commercial Code (for the *AdlC*)).

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The CPCE provides for different appeal procedures depending on whether *ARCEP*'s decisions are of an administrative or arbitrative nature.

The appeal of *ARCEP*'s administrative decisions is to be brought before the Administrative Supreme Court for decisions made on the basis of Article L.36-11 or Article L.5-3 of the CPCE, or before the Paris administrative court for decisions made by the Chairman acting as an authorising officer.

When it comes to *ARCEP*'s arbitration decisions relating to disputes taken on the basis of Article L.5-5 of the CPCE, the appeal is to take place before the Paris Court of Appeal, under the control of the Judicial Supreme Court pursuant to Article L.5-6 of the CPCE.

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Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

In France, electronic communication services or networks are mostly provided on the basis of a general authorisation and especially with regard to:

- The installation and operation of networks open to the general public.

  Before the adoption of Law n° 2004-669 of 9 July 2004, telecoms market entry was subject to individual authorisations. Since this law came into force, Article L.33-1 of the CPCE requires solely a prior notification to the *ARCEP*, subject, however, to limited exceptions (e.g. internal networks).

- The use of radio frequencies.

  The *ARCEP* may decide that some frequencies where the risk of harmful interference is deemed negligible may be freely used by telecoms operators, provided they comply with the technical conditions determined by the *ARCEP*'s decisions (e.g. *ARCEP* Decision n° 2015-0830 of 2 July 2015 related to the frequencies 470–789 MHz, 823–832 MHz and 1785–1805 MHz).

For the use of scarce resources (frequencies for which the risk of harmful interference is important and escalating), an individual authorisation is required. The beneficiary is authorised to use the designated frequency under strict technical conditions as specified in the authorisation, with protection against harmful interference.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

The main requirements attached to a general authorisation are related particularly to the applicant's identity and activities:

- Article L.33-1 of the CPCE precludes anyone who has lost, by reason of a withdrawal or suspension, the right to establish and operate a network open to public service or to provide electronic communication services, as well as anyone who has been sentenced to one of the penalties provided for in Article L.39 of the CPCE from proceeding with a notification.
- To be allowed to establish and operate networks open to the public as well as to provide electronic communication services to the public freely, telecoms operators are required to comply with several rules that are listed in Article L.33-1 of the CPCE:
  - quality, availability, safety and integrity of the network and service;
  - confidentiality and neutrality of the transmitted messages, information, standards and specifications for the networks and services offered;
  - net neutrality;
  - protection of health, environment, land use and town planning;
  - user information;
  - interconnection, interoperability and access;
  - funding of the universal service;
  - compliance with public order and national defence imperatives; and
  - access for disabled persons.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Individual authorisations are only used for scarce resources (radio spectrum for which the risk of harmful interference is important and escalating).

Individual authorisations define mainly the conditions under which they must operate, which equipment, networks, technology and services the allocated radio frequencies and numbers they must use. They also indicate their duration, which may not exceed 20 years (Article L.42-1 (for spectrum) and Article L.44 (for numbering resources) of the CPCE).

All or part of the individual authorisations can be transferred. Any proposed transfer shall be notified to the *ARCEP*. Where transfers involve a frequency that either has been specifically assigned to telecoms operators due to the scarcity of the resource or that is used for the performance of public service tasks, the assignment shall be subject to the *ARCEP*'s approval. The *ARCEP* may refuse the assignment on one of the grounds listed in Article R.20-44-9-5 of the CPCE (e.g. impairment of undistorted competition for accessing radio spectrum and its use). (For the restrictions on the change of control, see question 3.5.)

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The use of public and private land by telecoms operators is subject to a specific authorisation whose nature depends on the location of the telecoms infrastructures.

- With regard to the use of private land, telecoms operators are required to obtain an easement on private properties. Easements are to be granted by the mayor of the municipality where the property is located (Article L.48 of the CPCE).
- As regards public land, the nature of the authorisation differs depending on whether telecoms operators establish their network infrastructures on public highway land or other public properties:
  - In the former case, the required authorisation is called a "*permission de voirie*" and is delivered by the public authority in charge of that public land (Article L.47 of the CPCE).
  - In the latter case, the authorisation takes the form of a contract (*convention d'occupation du domaine public*) concluded between the telecoms operator and the public authority in charge of the relevant public land (Article L.46 of the CPCE).

The competent authority shall render its decision within two months from the request. Public land occupation may be subject to payment of fees, whose conditions of calculation are fixed by decree.

The establishment of telecoms infrastructures and equipment shall occur in respect of the environmental and aesthetic quality of the land, whether public or private, and under conditions that cause the least possible damage thereto (Article L.45-9 of the CPCE).

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Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Interconnection and access are authorised by agreement. The agreement, which defines the technical and financial conditions of access and interconnection, shall be notified to the *ARCEP*.

Operators of networks open to the public shall grant the requests of interconnection. Such requests shall not be rejected if they are justified by the requesting party's needs and the operator's capacity to meet them. Any refusal to interconnect shall be justified and notified to the requesting party as to the *ARCEP*.

In the process, the *ARCEP* may, at its own discretion or at the request of a party, impose conditions of access and interconnection on an objective, transparent and non-discriminatory basis.

Any dispute may be brought before and resolved by the *ARCEP* (Article L.36-8 of CPCE). In this case, the *ARCEP* shall reach a decision within a maximum period of six months as from date of referral. The *ARCEP* shall give the grounds of its decision, which specifies the equitable conditions, technical and financial, under which the interconnection or access must be ensured.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Operators that are deemed to exercise a significant influence over one telecoms sector market (SMP operators) may be required to publish its technical offering and pricing conditions where they are under non-discrimination obligations.

The obligation, if applicable, will be specified in the *ARCEP*'s decision designating operators with SMP (e.g. *ARCEP* Decision n° 2014-0735 of 26 June 2014).

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The *ARCEP* has control over prices and costs charged by SMP operators. It can force SMP operators, due to its significant power on the market, to fix the price of their services or products in light of their corresponding costs, and even provides for tariff ceilings (e.g. *ARCEP* Decision n° 2014-0735 of 26 June 2014, *op.cit.*; Administrative Supreme Court, 5 December 2005, n° 277441).

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

(a) Accounting separation: France Telecom (known as Orange) is under such an obligation (ARCEP Decision n° 06-1007 of 7 December 2006).

(b) Functional separation of France Telecom was envisaged by the *AdlC* in March 2011 (Opinion n° 11-A-05 of 8 March 2011). However, the *ARCEP* has not followed its opinion since it has considered that such a measure should be taken under exceptional circumstances, especially if more proportionate remedies fail to be applied.

(c) Legal separation has not been taken into consideration as a measure to be applied to telecoms operators yet.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

The CPCE and the General Code of the Territorial Authorities (CGCT) set forth specific rules to regulate private and public initiatives with regard to high-speed broadband networks.

Infrastructure managers have, for instance, the obligation to grant all reasonable requests for access of any operator of high-speed broadband networks open to the public. The access shall be provided under fair and reasonable terms and conditions or, otherwise, be refused under objective, transparent and proportionate criteria (Article L.34-8-2-1 of the CPCE).

A similar obligation applies to any person who establishes or has established in a building or operates a high-speed fibre optic electronic communications line capable of serving an end-user (Article L.34-8-3 of the CPCE).

Infrastructure managers, as the person mentioned in the paragraph above, shall respond to third parties' request within a maximum period of two months as from the date of receipt of such request.

Furthermore, without prejudice of the above-stated provisions, the *ARCEP* may compel:

- any telecoms operator to accept reasonable requests aiming at accessing physical infrastructures or cables which the telecoms operator has established pursuant to an easement or a "*permission de voirie*" or any associated resources; and
- any user of telecommunications networks within a building to accept any reasonable request aiming to access such networks where their duplication will be economically inefficient and physically impracticable (Article L.34-8-4 of the CPCE).

In addition, the CGCT assists in the development of high-speed broadband networks where economic conditions do not allow operators to do so by providing incentives, which take the form of aid and subsidies (Article L.1425-1, IV of the CGCT).

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The CPCE regulates prices in two cases: (a) when it comes to the universal service; and (b) to SMP operators.

(a) Connection to a fixed network open to the public and telephone service must be provided within the universal service at rates that comply with the principles of transparency, non-discrimination and cost orientation. These tariffs can be controlled by the *ARCEP* according to two different mechanisms, namely a procedure for prior checking of tariffs and a multiannual tariff framework (only for telephone communication offers).

From 2013 to 2016, the universal service was provided by Orange. The designation of the new operator is currently on-going.

(b) In exceptional cases, where the objectives cannot be reached through the implementation of traditional measures (listed in Article L.38 of the CPCE), the *ARCEP* may impose on telecoms operators to fix prices according to the related costs, to comply with a multiannual tariff framework, or to submit tariffs to the *ARCEP* for prior approval.

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Such measures were applied to France Telecom in 2005 until being lifted in 2006. Since then, no telecoms operator has been subject to such restrictions.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The specific rules applicable to consumers are mainly contained in the Consumer Code (CC). The rules stated therein especially set out conditions related to consumers' consent, performance of contract, payment method as well as consumer information (e.g. information with regard to the universal service: Article L.224-30 of the CC). Besides these specific rules, it should be noted that the general rules of the CC apply to communications service contracts (abusive clause, unfair competition, misleading practice).

Part of the consumers' protection is governed by the CPCE which earmarks provisions specific to the regulation of the universal service (fixation on price, conditions of control) as well as the rights to a detailed invoice and to number portability.

More recent legislations have improved consumer rights in the telecoms sector. Law n° 2016-1321 of 7 October 2016 implementing the net neutrality stated in EU Regulation (services of equal quality) has, for instance, established new obligations for telecoms operators towards disabled person (translating service).

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identification codes are allocated by the *ARCEP* per unit (e.g. short numbers) or by block (e.g. special numbers, ten-digit numbers) on a "first come, first served" basis. If several allocation requests are received on the same day and cover identical numbering resources, allocation is drawn by lots.

For some frequencies, the *ARCEP* may decide to proceed with an exceptional award procedure in order to ensure that operators have access to numbering resources in a transparent, objective and non-discriminatory manner.

The authority may allocate frequencies for an unlimited or limited time period, all or part of the requested resource, or simply refuse to grant licences.

2.17 Are there any special rules which govern the use of telephone numbers?

The use of telephone numbers is mostly regulated by the National Numbering Plan, which is managed and controlled by the *ARCEP* (e.g. short telephone numbers used for providing services related to subscribers' lines must be free).

Special rules are also set out in the Consumer Code (e.g. use of premium rate number: Article 224-38).

2.18 Are there any obligations requiring number portability?

Each telecoms operator shall offer to consumers, when changing operators, the option of keeping their number at a reasonable price.

The price shall be fixed in light of the corresponding costs and porting shall be carried out within a maximum of one working day.

Please note that this obligation applies only where:

- for geographic numbers, consumers are not moving from the allocated geographical area; or
- for non-geographic numbers, consumers are staying in metropolitan France or in France's overseas department or territories (e.g. Mayotte or Saint-Pierre and Miquelon) (Article 44 of the CPCE).

Effective portability will automatically cause termination of the contract concluded with the previous telecoms operator.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Spectrum use is regulated by several entities:

- The *ANFR* defines to which entities the frequency bands are allocated between the State administrations, the *ARCEP* or the *CSA*.
- The *CSA* and the *ARCEP* distribute radio frequencies, once allocated, to their respective assignees (for *CSA*, audio-visual media service providers; for the *ARCEP*, telecoms operators).

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The use of radio spectrum is authorised through general or individual authorisations (see question 2.5).

The "first come, first served" rule applies for allocating frequencies on the basis of an individual authorisation.

By exception, in case of scarcity of frequencies, the *ARCEP* may decide to implement selection procedures (comparative submission or auctioning procedure) before granting such an authorisation.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The *ARCEP* allows telecoms operators to use some frequencies under a general authorisation regime. This regime generally covers low-powered or large-brand systems (e.g. WiFi frequencies, RFID).

The *ARCEP* determines, by decision, the conditions under which such frequencies shall be used.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

In order to maintain their right to use frequencies, authorisation holders are required to pay the following fees:

- an annual State fee for the provision of frequencies; and
- an annual management fee to cover the management cost of radio spectrum and authorisations to use frequencies.

If the grant of frequencies results from an auction procedure, beneficiaries shall also pay the amount they have committed to pay under the procedure.

The above fees are calculated pursuant to Decree n° 2007-1532 of 24 October 2007.

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3.5 What happens to spectrum licences if there is a change of control of the licensee?

A change of control of the licensee does not result in the creation of a new entity. Therefore, no transfer occurs and spectrum licences are deemed to be still owned by the licensee (Administrative Supreme Court, 30 June 2006, nº 289564, Société Neuf Telecom SA).

However, the proposed transaction shall be subject to prior notification to the *ARCEP*, which will ensure that the operation does not impact the conditions attached to the authorisation.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Spectrum licences may be fully or partially assigned so long as they are deemed assignable by ministerial order (Order of 11 August 2006).

Two types of procedure to assign spectrum licences exist:

(1) If spectrum licences were allocated according to the "first come, first served" rule, their assignment is only subject to notification to the *ARCEP*.

The *ARCEP* has six weeks as from the date of reception of a complete request to refuse the assignment.

(2) In the event they were allocated following a selection procedure or if the assigned frequencies ensure the continuity of public service, their assignment is subject to prior approval by the *ARCEP*.

The *ARCEP* shall render its decision within a three-month period. If it fails to respond within the time limit, the assignment shall be deemed rejected.

The price of the assignment is freely fixed by the parties.

By opposition, any sub-licence of such spectrum licences is subject to the *ARCEP*'s prior approval. In this case, the *ARCEP* should take a decision within two months.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The legal framework for cybersecurity has progressively and mainly been developed in France by the following laws and regulations:

- Law n° 78-17 of 6 January 1978, amended by Law n° 2004-801 of 6 August 2004, introduced the obligation of personal data controllers to take useful measures to ensure the safety of personal data. This obligation has been strengthened by Regulation (EU) n° 2016/679 of 27 April 2016, which will soon be applicable (on 25 May 2018).
- Law n° 88-19 of 5 January 1988 ("Godfrain"), amended by Law n° 2004-575 of 21 June 2004, created the criminal offence of unlawful intrusion into an information processing system, codified in Article 323-1 *et seq*. of the Criminal Code.
- Decree of n° 2005-862 of 26 July 2005 integrated Article D.98-5 in the CPCE, amended by Decree n° 2012-488 of 13 April 2012, which states the obligation of telecoms operators to take all technical and organisational measures to ensure the security of their network.
- Lastly, Law n° 2013-1168 of 18 December 2013 states that operators which are essential for national security must reinforce the security of their information systems. This Law has been codified in the Defence Code (Article L.1332-6-1 *et seq.*).

Further developments are to be expected in the future through the implementation of Directive n° 2016/1148 of 6 July 2016 which aims at providing a high common level of security of network and information systems across the Union. Its implementation shall occur before 9 May 2018.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The legal framework for judicial and administrative interceptions of communications was initiated by Law n° 91-646 of 10 July 1991.

The regulation of judicial interceptions codified in the Criminal Procedure Code (CPC) was substantially modified by Law n° 2004-204 of 9 March 2004 (allowing interception of communications in the course of preliminary investigations and investigations of flagrancy) and recently by Law n° 2016-731 of 3 June 2016 (expanding the possibilities for interception in case of organised crime and terrorism).

The regulation of judicial interceptions from the Domestic Security Code (DSC) was separately amended by Law n° 2013-1168 of 18 December 2013 (enhancing entities' powers with regard to Internet users' communications) and Law n° 2015-912 of 24 July 2015 (by introducing a new regime for the purposes of national defence and protection of the nation's fundamental interests).

A legislative loophole followed the invalidation by the Constitutional Council of the provision dedicated to the interception of international electronic communications (Decision n° 2015-713 DC of 23 July 2015). Law n° 2015-1556 of 30 November 2015 was rapidly enacted to address the issue by offering a replacement regime.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Telecoms operators are called upon to work closely with judicial and administrative authorities on the investigation, detection and prosecution of crime.

Their participation consists in (1) intercepting communications, and (2) communicating information.

(1) *Interception of electronic communications*

In the course of their investigation, judicial and administrative authorities may order interception of communications.

The execution of such operation is strictly circumscribed by the CPC (Article 100 *et seq.*) and the DSC (Article L.852-1 *et seq.*).

For instance, the investigating judge may order such interception only:

- for crimes or offences punishable by two years or more of imprisonment;
- if it is required by the investigation; and
- for a maximum period of one year, this period being extended to two years in exceptional circumstances (Articles 100 and 100-2 of the CPC).

For the purpose of installing an interception device, the investigating judge may request the assistance of any qualified agent of a network operator or of any authorised electronic communication service provider (Article 100-3 of the CPC).

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For administrative interception procedure, see question 4.4.

Upon order of administrative and judicial authorities, telecoms operators are required to install and implement any necessary means to intercept communications and to appoint a qualified agent to operate material operations for implementing the interception. Only the qualified agent will have access to and will be authorised to use the interception system (Article D.98-7 of the CPCE).

In accordance with Article L.32 of the CPCE and Article 706-102-1 of the CPC, interception of communications may proceed on any form of communication whether traditional telephone calls, VoIP calls, emails or even instant messaging.

(2) *Communication of information*

Judicial and administrative authorities may order access and disclosure of connection data through judicial and administrative requisitions issued on the ground of Articles 60-1, 60-2, 77-1-1, 77-1-2, 99-3 and 99-4 of the CPC and Article L.851-1 *et seq*. of the DSC.

To comply with such requisitions, pursuant to Article L.34-1 of the CPCE, telecoms operators shall retain certain categories of technical data for a limited period of time. These categories of data and the length of their retention are determined by Decree of the State Council (see question 4.6).

4.4 How does the state intercept communications for a particular individual?

Permission to intercept telephone calls is granted by the *PM* only for the purposes of prevention of terrorism and after consultation with the National Commission for the Control of Intelligence Techniques (*CNCTR*). Such authorisation is granted on written and reasoned proposals from the ministers in charge, whether of defence, interior, justice, economy, budget or customs (Article L.852-1 and Article L.821-1 *et seq*. of the DSC).

Subject to the principle of proportionality, the authorisation of the *PM* specifies the technical scope of the implementation of such interceptions.

The authorisation is valid for a maximum of four months.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Under French law, anyone may freely use encryption means.

The supply, import, export and transfer of encryption means to and from a Member State of the European Union are unrestricted, provided these means do not have an exclusive function to authenticate data or to control data security (Article 30 of Law n° 2004-575 of 21 June 2004). Otherwise, these operations shall be subject to prior notification to the French National Cybersecurity Agency (*ANSSI*), unless specifically exempted based on Appendix I of Decree n° 2007-663 of 2 May 2007.

As an exception, any transfer to a Member State of the European Union, and export of encryption means that are not to be implemented for authentication or data security control purposes, are deemed to be subject to prior approval by the *PM*. These operations may however be exempted by Article 2 and Appendix II of Decree n° 2007-663 of 2 May 2007.

The formalities are to be completed by the provider of the encryption means as specified by the Ministerial Order of 29 January 2015.

The provider or the person who transfers or imports the means holds at the *PM*'s disposal any details of the technical characteristics of the means as any source code of the software used.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

As mentioned in question 4.3, telecoms operators shall be capable of responding to the enquiries of judicial and administrative authorities related to the communication of data.

In this respect, Article L.34-1 of the CPCE requires telecoms operators to retain certain categories of technical data for a limited period of time (see question 4.3).

The data retained shall relate exclusively to the identification of users of the telecommunications services, the technical characteristics of the communications and the location of terminal equipments (Article L.34-1 VI of the CPCE).

This includes:

- information allowing users to be identified;
- data related to the terminal equipment used to make the communication;
- the technical characteristics, date, time and duration of each communication;
- data related to complementary services requested or used by users and to the suppliers of those services;
- data allowing the identification of the recipient of the communication; and
- geolocation data (for telephony services only) (Article R.10-13 of the CPCE).

These data shall be retained for a period of one year as from their recording date.

For billing, payment of electronic communication and commercial purposes, telecoms operators may also hold data. However, this retention is at their own discretion (Article 34-1 IV of the CPCE).

A similar obligation was imposed on Internet infrastructure operators by Law n° 2004-575 of 21 June 2004. Web hosts and Internet service providers hold and retain data which enable the identification of whoever has contributed to the creation of content on their website.

According to Article 1 of Decree 2011-219 of 25 February 2011, these data shall be retained for one year from when subscribers connect to the Internet; contents are created by an Internet user, and when subscribers create an account.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is framed by Law n° 86-1067 of 30 September 1986, with the assistance of the *CSA* which is in charge of overseeing its implementation.

The legal regime is qualified as being a burdensome one.

While stating that audio-visual communication shall be free, the Law enumerates several rules and obligations with which participants of the sector are compelled to comply:

- The use of frequencies by private entities for distributing audio-visual content is subject to prior approval by the *CSA* (see question 5.3). By exception, the non-users of such frequencies (e.g. distributor of audio-visual services) are only required to file a declaration (Article 34).
- The content of audio-visual communications shall respect individual rights (child protection: Article 15; marketing, sponsorship, product placement rules: Decree n° 92-280 of

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27 March 1992) as well as community rights (e.g. quotas for film and audio-visual work in "original" French language (60% during "prime": Article 70)).

- The implementation of concentration (limitation on the number of authorisations or on the holding of capital and voting rights by person, whether legal or natural (Article 39 *et seq*.)).

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Since the adoption of Law n° 2009 – 258 of 5 March 2009 which modifies Article 2 of Law n° 86 – 1067 of 30 September 1986, new distribution platforms, including those using the Internet, are regulated under the audio-visual regulation (e.g. on-demand audio-visual services, on-demand video services and catch-up TV).

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

In terms of allocation of frequencies, private and public audio-visual media companies are treated differently.

As a principle, public companies benefit from a general right to use radio spectrum resources and frequencies which are allocated as a priority to them. They are not subject to preliminary formalities. A specification (*cahier des charges*), which shall be approved by decree, sets forth their key obligations. Public companies are also bound by their commitments embodied in the contract they conclude with the government for the purpose of obtaining funding (*contrats d'objectifs et de moyens*).

By opposition, the *CSA* use a selective procedure to allocate frequencies to private audio-visual media companies. The authority selects the candidates through a call for applications procedure and concludes a convention with them which formalises their key obligations (*individual authorisation*) (Article 28 of Law n° 86 – 1067 of 30 September 1986).

Distributors of audio-visual services that do not use frequencies assigned by the *CSA* (cable, satellite, ADSL, Internet) are only subject to prior notification to the *CSA* (*general authorisation*).

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Any change in beneficiary, whether change in capital composition or change in identity through assignment, is subject to approbation by the *CSA*.

The *CSA* cannot approve direct or indirect change of control of the beneficiary within five years as from the date of issue of the authorisation, except if economic difficulties threaten the viability of the company.

Please note that the rules related to concentrations apply in this situation. The *CSA* will verify whether the participation in capital and voting rights in the beneficiary company does not exceed the limits provided by law (e.g. for foreign investors: 20%).

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Telecoms operators may avoid civil and penal liabilities for carrying contents over their networks on the ground of Article L.32-3-3 of the CPCE except if they are the originator of the transmission in dispute, they select the recipient of the transmission or they select or modify the transmitted content.

While applying this provision, courts seek to verify whether the operator conducts an activity of transmission via an electronic communication network and differentiate this status from the status of e-trader (Grenoble Court of First Instance, 1 February 2007, nº 11-05-001040).

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Law n° 2004-575 of 21 June 2004 sets forth specific obligations for Internet service operators in order to directly and indirectly assist content owners.

Article 7 of the Law imposes on Internet service providers, when they mention, for advertising purposes, the possibility to download content they do not provide, to include in their advertising an easily identifiable and readable indication stating that piracy harms the creation of art.

Telecoms operators and Internet service providers are also called upon to cooperate with judicial and administrative authorities in the course of their investigating procedure.

For instance, upon judicial authorities' request, Internet service providers shall implement appropriate measures to prevent or put an end to any infringement of copyright or related rights (Article 6 I 8; Article L.336 – 2 of the Intellectual Property Code).

Internet service providers as well as telecoms operators shall punctually and temporarily intercept communications or operate surveillance activities (see Article 6 I 7; for telecoms operators, see question 4.3).

Besides, Internet service providers like telecoms operators shall retain data which enable the identification of whoever has contributed to the creation of content of the website they provide, and provide them to judicial authorities if they require their disclosure (see Article 6 II and question 4.6).

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

A principle of non-discrimination governs the relationship between telecoms operators and Internet service providers when it comes to traffic routing and service access.

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This principle has been defined as one of the main objectives that the minister in charge of electronic communication and the *ARCEP* shall reach while taking measures in the telecoms sector (Article 32-1 III 5°*bis* of the CPCE).

This principle has been emphasised by the Regulation (EU) n° 2015/2120 of 25 November 2015 which is directly applicable in France since 30 April 2016.

It expressly mentions in its first recital that the aim of the rules it provides is to ensure equal and non-discriminatory treatment while providing Internet access to final users.

Since the adoption of Regulation (EU) n° 2015/2120 of 25 November 2015 and Law n° 2016-1321 of 7 October 2016, net neutrality has been expressly mentioned in the CPCE. In this respect, the *ARCEP* has been entrusted to protect and control net neutrality.

They are able to differentially charge traffic over networks but under exceptional circumstances only.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

When specifically requested by judicial or administrative authorities, Internet service providers shall block access to certain websites.

Article 6 I 8 of the Law n° 2004 – 575 of 21 June 2004 provides that judicial authorities may, in summary proceedings or on application, compel any Internet service provider to take all necessary measures to prevent or to put an end to the harm caused by the content it provides.

Websites likely to be blocked are websites with contents that violate individual rights (e.g. contents with racial or pornographic connotation: Article 6 I 7° of Law n° 2004-575 (*supra*)), property rights (Article L.336-2 of the Intellectual Property Code) or that constitute an apology of incitement to terrorism.

The Administration via the Central Office for Combating Information and Communication Technology Crime (OCLCTIC) may impose on Internet service providers to block websites, specifically when the contents constitute an apology of incitement to terrorism (Article 6-1 of Law n° 2004-575 (*supra*)). Any failure to do so exposes them to sanctions (one year of imprisonment and a fine up to €375,000).

Unlike some foreign countries, France has decided to regulate the use of VPN services. The *ARCEP* allocates specific numbers (starting with 085) to duly notified telecoms operators and states conditions of use or access by decision.

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Germany

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(a) According to the annual report of the *Bundesnetzagentur* (German Federal Network Agency, "*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*"), the annual revenue of the telecoms sector in Germany (including the internet) was EUR 56.7 billion in 2016 (as cited by Annual Report 2016 of the German Federal Network Agency, Markets in the Digital Revolution).

Today, major players include Deutsche Telekom with 35.7% market share for mobile services; Vodafone Deutschland with a share of 26.3%; and Telefónica Germany with 38.0% (Financial Statement of Télefonica 2016). Deutsche Telekom used to be a state-owned monopoly company until the telecoms market was liberalised in 1996, but since then has been facing competition by operators with their own networks. In 2014, Telefónica Germany acquired its competitor E-Plus (KPN's mobile unit in Germany), making it the market leader by overall number of customers. Prior to the E-Plus merger, Telefónica Germany was only represented by its brand o2 (which is now Telefónica's main brand in Germany), holding at the time the fourth-largest share of mobile customers in Germany.

The costs to obtain the required mobile spectrum licences are relatively high in Germany. Consequently, barriers of entry to the market are significant, as shown by the fact that there are only three companies in the market with their own networks. Yet, barriers to entering as a Mobile Virtual Network Operator (MVNO) are much lower, as it is relatively simple and low-cost to rent capacity from the established network operators and then set up a business.

Concerning the broadband market, Deutsche Telekom (41%) still dominates, with more than double the number of customers subscribed to the company with the next biggest share of customers Vodafone (19.5%, including KabelDeutschland). 1&1 follows with 14% and Unitymedia with 10.6% of customers. Telefónica Germany only offers fixed line through its o2 brand, reaching 6.7% of the customers (www.dslweb.de). However, from its marketing activities, it is clear that Telefónica Germany is attempting to catch up with the market leaders.

(b) The distribution of audio-visual media as part of broadcasting is part of the telecoms sector with respect to the signal transmission, e.g. cable, satellite, etc. The total revenue in the private broadcasting sector was EUR 11.1 billion in 2016 (the website of Verband privater Rundfunk und Telemedien e.V.). The pay-tv sector generated revenues of about EUR 2.3 billion in the same year. Home Video services, including DVD sales and rentals, reached EUR 2.9 billion. The market for audio-visual media distribution is dominated by ProSieben Sat1 Media, the RTL group and Sky Deutschland.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) On a European level, the EU Commission adopted the Digital Single Market Strategy, which is followed by the future revision of certain EU directives. Furthermore, provisions like EU regulation 531/2012 on roaming fees are important.

The German telecommunications market is mainly governed by the Telecommunications Act ("*Telekommunikationsgesetz*", abbr. TKG), which is partly based on EU directives. The Telecommunications Act provides for various regulatory fields, including regulation of market access fees and market abuse. Several sub-statutory ordinances further specify the requirements of the Telecommunications Act, see question 2.2 for details.

(b) The audio-visual media distribution sectors are principally governed by the Interstate Broadcasting Agreement ("*Rundfunkstaatsvertrag*"), the Interstate Treaty on the Protection of Minors in Broadcasting and Telemedia ("*Jugendmedienschutz-Staatsvertrag*") and the Telemedia Act ("*Telemediengesetz*", abbr. TMG). Other Interstate Agreements cover the funding of public service broadcasting ("*Rundfunkfinanzierungsstaatsvertrag*", "*Rundfunkbeitrags-staatsvertrag*").

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) The Federal Network Agency ("*Bundesnetzagentur*") is the competent regulatory authority for the telecoms sector, headquartered in Bonn.

The Federal Cartel Office ("*Bundeskartellamt*", abbr. BKartA) takes care of possible anti-competitive practices and merger control procedures and enforces the Act against Restraints on Competition ("*Gesetz gegen Wettbewerbsbeschränkungen*", abbr. GWB). However, this does not include the control of market abuse by companies with significant market power, which is carried out by

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the Federal Network Agency according to sections 28 and 42 of the Telecommunications Act.

The individual Federal State competition authorities ("*Landeskartellbehörden*") implement the Act against Restraints on Competition. They enforce the ban on cartels according to section 1 of the Act against Restraints on Competition control abuses by undertakings that dominate the market or are in strong market positions. They also keep a check on violations of the ban on discrimination and impediment. Their jurisdiction is limited to cartel-law-related actions which do not extend beyond the territory of each Federal State. The body responsible for issues that extend beyond the borders of one Federal State and for the control of mergers is the Federal Cartel Office based in Bonn.

The Federal Data Protection Commissioner ("*Bundesdatenschutzbeauftragter*") is responsible for controlling, according to sections 24 and 26, respectively, of the Federal Data Protection Act ("*Bundesdatenschutzgesetz*", abbr. BDSG), and advising federal authorities, other public bodies on the federal level, telecommunications and postal service providers according to the Telecommunications Act and the Postal Act ("*Postgesesetz*", abbr. PostG). The Commissioner advises and monitors the implementation of security checks under the Security Screening Act ("*Sicherheitsüberprüfungsgesetz*", abbr. SÜG) in respect of public authorities and private companies. Where the personal data is collected, processed or used for the commercial provision of telecommunications services, the Federal Data Protection Commissioner is responsible for monitoring compliance with data protection regulations and for the provision of any complaints to the Federal Network Agency according to section 115 (4) of the Telecommunications Act.

The Data Protection Commissioners of the respective Federal States ("*Landesdatenschutzbeauftragter*") are responsible for controlling and advising public authorities of the respective states on matters of data protection.

The Centre for Protection against Unfair Competition ("*Wettbewerbszentrale*") has a formal, i.e. judicially authorised, right to initiate legal action against those who infringe the Act against Unfair Competition ("*Gesetz gegen den unlauteren Wettbewerb*", abbr. UWG) and is a self-regulatory body in trade, industry and commerce for the purpose of the Act. This includes any misleading advertisements (e.g. showing cheaper prices on the platform of Google Shopping than actual prices in the online shop) and sole position advertisement (e.g. "cheapest flat rate in Germany") in particular. According to section 8 (3) of the Act against Unfair Competition, individual competitors, trade organisations, consumer organisations and the chamber of commerce have a right of action against unfair competitors, which excludes individual consumers (although they may have claims under contract or general tort law).

(b) The 14 federal state media authorities in Germany (*Landesmedienanstalten*) are in charge of licensing, controlling, structuring and promoting commercial radio and television in Germany. Furthermore, there are self-regulatory bodies like the German Association for Telecommunications and Media ("*Deutscher Verband für Telekommunikation und Medien e.V.*", abbr. DVTM) and the German Voluntary Self-Regulation of the Movie Industry ("*Freiwillige Kontrolle der Filmwirtschaft GmbH*", abbr. FSK).

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(a)(i) Historically, the German telecommunications industry has been characterised by public service monopoly providers, run in conjunction with postal services. The liberalisation of the telecoms market began in the first half of the 1980's and was fully liberalised in 1998, leading to considerable reductions in some prices and a wider range of services being provided.

(a)(ii) Concerning investment, there are no restrictions to foreign investment in the telecoms market.

(b)(i) Together with the telecoms market, the audio-visual media distribution sectors were fully liberalised in 1998. Still, EU Directive 2010/13/EU concerning the provision of audio-visual media services (Audio-visual Media Services Directive) promotes European programmes.

(b)(ii) There are no foreign investment restrictions in the audio-visual media distribution sector.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Germany is a member of the WTO, has signed the GATS in 1994, and furthermore, has adopted and implemented the telecoms reference paper, initially signed by the European Communities, including Germany.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

As already mentioned in question 2.2, the telecoms market is primarily governed by the German Telecommunications Act ("*Telekommunikationsgesetz*", abbr. TKG).

Yet, several ordinances further detail and specify these provisions, including the Telecommunications Numbering Ordinance ("*Telekommunikationsnummerierungsverordnung*", abbr. TNV), Telecommunications Numbering Fees Ordinance ("*Telekommunikations nummerierungsgebührenverordnung*", abbr. TNGebV), Emergency Calls Ordinance ("*Notrufverordnung*", abbr. NotrufV), Telecommunications Fees Ordinance ("*Telekommunikationsgebührenverordnung*", abbr. TKGebV), Telecommunications Monitoring Ordinance ("*Telekommunikations-Überwachungsverordnung*", abbr. TKÜV), Frequency Fees Ordinance ("*Frequenzgebührenverordnung*", abbr. FGebV), or the Frequency Levy Ordinance ("*Frequenzschutzbeitragsverordnung*", abbr. FSBeitrV).

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Other statutes contain additional provisions that refer to the regulation of the telecommunications market. These acts include the Telemedia Act ("*Telemediengesetz*", abbr. TMG), Federal Data Protection Act ("*Bundesdatenschutzgesetz*", abbr. BDSG), which will be partly replaced by the European General Data Protection Regulation – being directly applicable without the need to implement national legislation and taking effect on 25 May 2018 – and Local Data Protection Acts of the individual Federal States. The National Federal Data Protection Act will still be amended in future in order to regulate aspects such as the sectoral regulations, the transitional rules or the implementation of additional requirements, where discretion is given by the European General Data Protection Regulation. The first draft law containing necessary national legislative changes has been published in Germany.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The Federal Network Agency ("*Bundesnetzagentur*"), the Federal Cartel Office ("*Bundeskartellamt*"), the competition authorities of each Federal State ("*Landeskartellbehörden*"), the Federal Data Protection Commissioner ("*Bundesdatenschutzbeauftragter*"), the Data Protection Commissioners of the respective Federal States ("*Landesdatenschutzbeauftragter*") and the Centre for Protection against Unfair Competition ("*Wettbewerbszentrale*") are the main regulatory bodies for the telecommunications market, which are independent from the government. Regarding their different roles, see question 1.3.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The decisions of the Federal Network Agency ("*Bundesnetzagentur*") can be appealed according to section 137 of the Telecommunications Act ("*Telekommunikationsgesetz*", abbr. TKG). The grounds for an appeal are not specifically stated in the Telecommunications Act. The decisions can be appealed due to procedural or substantive reasons.

Procedural reasons are the breach of formal requirements during the decision making of a public authority (e.g. the Federal Network Agency). These reasons include the lack of competence of the deciding authority and a violation of procedural matters, such as a proper hearing of the concerned parties, the participation and co-operation of third parties, the public information and consultation, the proper form of the decision (e.g. written decision with valid information about the possibilities of appeal), or the proper statement of grounds of the decision.

Substantive reasons are the wrongful application of statutory law, which includes the wrongful application of the legal basis (e.g. not acknowledging an exemption from general rules), the wrong subject of the Federal Network Agency order (e.g. imposition of access obligations despite the fact that the recipient does not possess significant market power), the legal or factual impossibility of the execution of the order, a lack of clarity of the imposed obligation (for instance, price regulation decision without a clear and transparent price definition), or the lack of proportionality and reasonableness of the decision (for example, clear and significant disproportion between the purpose and the means of the order).

The Federal Network Agency's order can be *appealed* to the Administrative Court of Cologne and the German Federal Administrative Court ("*Bundesverwaltungsgericht, Leipzig*"), following the Administrative Procedure Act and Rules of the Administrative Courts ("*Verwaltungsverfahrensgesetz*", abbr. VwVfG, and "*Verwaltungsgerichtsordnung*", abbr. VwGO), as well as the German Federal Constitutional Court ("*Bundesverfassungsgericht*", abbr. BVerfG, which is headquartered in Karlsruhe) and the European Court of Justice in particular circumstances.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Individual licences to provide telecommunications services are no longer required under German law. Instead, there is a general authorisation for companies to offer telecommunications services to the public. This entitles them to:

- negotiate interconnection with other providers in the EU;
- obtain access to or interconnection with other providers; and
- be designated to provide certain universal service functions.

Yet, the provider must notify the Federal Network Agency ("*Bundesnetzagentur*").

As there are no specific licences for the provision of general telecommunications services, no licence fees are charged. However, providers must pay a Frequency Usage Fee and a Frequency Levy according to the Frequency Fees Ordinance and the Frequency Levy Ordinance, which are calculated by taking into account the turnover of the individual companies. The Federal Network Agency provides annual information about the above fee and levy.

The spectrum use is assigned individually on application within a six-week period. Where there is not a sufficient spectrum available for assignment, the Federal Network Agency orders that an award procedure in the form of an auction takes place. Previously, there have always been more applicants for the frequencies than available spectrum. Therefore, auctioning is the usual way of allocation.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Only the *allocation of frequency spectrum* is subject to general authorisation. Section 52 of the Telecommunications Act ("*Telekommunikationsgesetz*", abbr. TKG), the Frequency Ordinance ("*Frequenzverordnung*", abbr. FreqV) as well as the Federal Network Frequency Plan that is updated every year, specify the allocation.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Individual authorisations mainly concern the use of certain telephone numbers, the usage of individual spectrum allocations and certain rates.

Regarding *spectrum allocations*, according to section 55 (9) of the Telecommunications Act, frequencies are typically assigned for a *limited period,* with the possibility of extension. The time limit shall be appropriate to the service concerned, thus the investment made. The duration usually ranges between 10 to 20 years. All *other* individual authorisations are limited in time, as well.

Spectrum can be *transferred* as set out in our answer to question 3.6. *Numbers* may only be transferred to affiliates and/or legal successors,

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requiring the Federal Network Agency's consent. *Rights of way* are highly personal rights which can be transferred to an undertaking only after verification that the applicant possesses the required reliability, efficiency and specialised knowledge. Such rights of use can, therefore, only be used by the holders themselves and may not be given or transferred to another undertaking nor passed on to another undertaking by legal succession, section 68 *et seq*. of the Telecommunications Act.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Since 2004, the German Telecommunications Act includes new provisions on the *rights of way* (section 68 *et seq*. of the Telecommunications Act). The Federal Network Agency transfers the rights of way, upon written application, to the public telecommunications network operators. If such use is not possible, or is possible only at disproportionately high expense, the operator is granted a shared use of other installations that already exist, where shared use is economically reasonable and no major additional construction work is needed.

According to section 76 of the Telecommunications Act, *private property* owners have to bear installation, operation or renewal of telecommunications insofar as:

1. on his property, a line or installation that is secured by right is used also for the installation, operation or renewal of a telecommunications line and the usability of the property is not thereby additionally restricted on a lasting basis; or
2. the property is not, or is not significantly, affected by such use.

A property owner having to acquiesce in actions may claim appropriate pecuniary compensation from the operator of the telecommunications line or the owner of the network under particular circumstances set out in section 76 (2) of the Telecommunications Act.

Civil or administrative courts would have to deal with the above-mentioned issues.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Upon request, every public telecommunications network operator is required to make an interconnection offer to other public telecommunications network operators in order to secure user communication, the provision of telecommunications services and service interoperability throughout the European Union (section 16 of the Telecommunications Act).

The Federal Network Agency can impose obligations, upon request, on public telecommunications network operators that control access to end-users and do not have significant market power to interconnect to their networks with those of other public telecommunications network operators (section 18 (1) of the Telecommunications Act).

In order to promote sustainable competition in the retail market, the BNetzA can require public telecommunications network operators controlling access to end-users not to treat other public telecommunications network operators differently without objectively justifiable reasons (section 18 (2) of the Telecommunications Act).

Furthermore, the BNetzA is able to require public telecommunications network operators *with significant market power* to create the necessary prerequisites for the interoperability of end-to-end communication, including the provision of facilities for intelligent network services and roaming (section 21 (2) no. 4 of the Telecommunications Act).

As mentioned, each operator of a telecommunications network which serves to provide telecommunications services for the general public is under an obligation to enter into negotiations about interconnecting its network with that of other operators upon request. If the parties do not reach an agreement or do not agree on the fee that is to be paid for the interconnection, they can appeal to the Federal Network Agency, which can hence order interconnection after hearing the parties within a period no longer than 10 weeks (section 25 of the Telecommunications Act). In the event of other interconnection disputes, the ruling chamber of the Federal Network Agency can also issue a binding decision on request of either party and after hearing both of the parties within four months of the request, according to section 133 of the Telecommunications Act.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The Federal Network Agency requires SMP operators to publish a reference offer which sets out the specifics of the granted access (section 23 of the Telecommunications Act).

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The German Telecommunications Act generally provides for an *ex ante price regulation* (section 30), an *ex ante rate regulation* (section 39) and an *ex post rate regulation* (section 38).

The *interconnection prices* can be regulated by the Federal Network Agency (section 30 *et seq*. of the Telecommunications Act), if the interconnection is ordered in accordance with section 21 of the Telecommunications Act. However, such an order is only possible for public telecommunications providers with *significant market power*.

For providers *without* significant market power, the Federal Network Agency cannot regulate the interconnection prices. The providers can only make an offer to other providers on request according to section 16 of the Telecommunications Act. The Telecommunications Act does not state any details about such an offer (in particular, no details regarding pricing) and does not entitle the Federal Network Agency to set these prices. The TeliaSonera decision of the Court of Justice of the EU is important here, where the European court has ruled that it constitutes a breach of the negotiation obligation if a company without significant market power makes an interconnection offer on terms that are likely to hinder the development of a competitive market at the retail level. Therefore, even if the interconnection charges are not regulated for providers without significant market power, the providers cannot issue offers that are completely commercially unviable in relation to charges.

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2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Operators are not subject to accounting, functional or legal separation in Germany. In regard to access services, the Federal Network Agency may impose obligations as functional separation under certain conditions, e.g. lack of competition or market failure.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Due to the federal structure of Germany, the regulation applicable to high-speed broadband networks is highly complex.

On a federal level, the regulatory framework on next-generation access ("*Next-Generation-Access-Rahmenregelung*") deals with possible incentive measures for broadband expansion. This framework tries to ensure that state aid on broadband expansion complies with the EU regulation on state aid pursuant to Article 101 *et seq*. of the Treaty of the Functioning of the European Union (English abbr. TFEU). In Germany, funding is granted for two models on a federal level:

(1) the profitability gap model ("*Wirtschaftlich-keitslücken-modell*"), where the profitability gap is covered by the state; and

(2) the operator model ("*Betreibermodell*"), where municipalities are subsidised to roll out passive infrastructure that will be leased to network operators.

Around 75% of funds go to the profitability gap model (according to Europe's Digital Progress Report 2017).

Still, the regulatory provisions of *each Federal State* (economic law for communes, "*kommunales Wirtschaftsrecht*") are applicable if municipalities decide to support broadband expansion.

Furthermore, the *Telecommunications Act* includes provisions on high-speed broadband networks like the regulatory objective in section 2 (2) no. 5 of the Telecommunications Act in order to accelerate the broadband network expansion. Also, investments on high-speed broadband networks must be taken into account by the Federal Network Agency according to section 30 of the Telecommunications Act. According to section 15a of the Telecommunications Act, the Federal Network Agency has the power to adopt administrative provisions in order to establish a regulatory approach for the broadband network expansion. As regards details on the sharing of passive infrastructure see question 2.8, and especially section 77a *et seq*. of the Telecommunications Act.

In 2016 the Network Alliance for a Digital Germany ("*Netzallianz Digitales Deutschland*") and the Federal Ministry of Transport and Digital Infrastructure ("*Bundesministerium für Verkehr und digitale Infrastruktur*", abbr. BMVI) set out the first gigabit strategy in the document entitled "*Eckpunkte Zukunftsoffensive Gigabit-Deutschland*", which stresses the need to install fibre infrastructure on a large scale. The roadmap envisages four stages and outlines the following goals: 50 Mbps for all households (by the end of 2018); deployment of fibre infrastructure in underserved industrial areas (by the end of 2019); creating the preconditions for nationwide 5G roll-out (by the end of 2020); and gigabit-capable converged infrastructure (by 2025).

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

As regards *retail price controls*, the Telecommunications Act does not provide for any *ex ante* control measures. However, according to section 66d of the Telecoms Act, price caps apply to premium services and shared cost services as well as to roaming pursuant to regulation (EU) 2015/2120.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

"Universal services" are services regarded as indispensable for the public as basic services. Where there is insufficient supply, the telecommunications providers must ensure the provision of "universal services", which are a minimum set of services to the public with a certain defined quality and to which all end-users must have access at an affordable price regardless of their place of residence or business (*section 78 et seq. of the Telecommunications Act*).

The Telecommunications Act contains provisions for details regarding the price communication in advertisements and proper information of the terms and conditions (section 43a *et seq*. of the Telecommunications Act). Furthermore, rates must be announced prior to the start of a telephone service; maximum charges can be set; and premium rates must be interrupted after 60 minutes (section 66a *et seq.* of the Telecommunications Act). Section 47a of the Telecommunications Act provides for an arbitration board for consumers.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The Federal Network Agency allocates telephone numbers on request and provides these telephone numbers in accordance with the Telecommunications Act ("*Telekommunikationsgesetz*", abbr. TKG), the Telecommunications Numbering Ordinance ("*Telekommunikationsnummerierungsverordnung*", abbr. TNV) and the Telecommunications Numbering Fees Ordinance ("*Telekommunikationsummerierungsgebührenverordnung*", abbr. TNGebV). The allocation method for geographic numbers is described in detail in an administrative instruction that is available at the Federal Network Agency's website. The Federal Network Agency aims at providing a non-discriminatory and technology-neutral solution with sufficient availability of geographic telephone numbers, while also protecting the interests of consumers. It publishes an annual numbering policy stating the current development of the telecommunications market and the possible implications of such current development on telephone number allocation practice. The numbering policy for the year 2015 is available at the Federal Network Agency's website.

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2.17 Are there any special rules which govern the use of telephone numbers?

Telecommunications service providers must provide a number of different services. The most important of such services are *emergency calls* (section 108 of the Telecommunications Act), *grid interconnection* (section 16 of the Telecommunications Act) and *universal services* (section 78 *et seq.* of the Telecommunications Act).

Any person offering publicly available telephone services must provide all users with access to the emergency services by using, free of charge, the single European emergency call number "112" and the additional national emergency call numbers determined in the respective ordinance (Emergency Calls Ordinance, "*Notrufverordnung*", abbr. NotrufV). Any person operating telecommunications networks used for publicly available telephone services must transmit to the local emergency service centre, without undue delay, emergency calls, including the calling line identity or, where the calling line identity is not available, the data required to prosecute any misuse of emergency calls as provided in the Emergency Calls Ordinance, and the information required to identify the location from which the emergency call originated.

In case of insufficient supply, the telecommunications providers must ensure the provision of "universal services", which are a minimum set of services to the public with a certain defined quality, and to which all end-users must have access at an affordable price regardless of their place of residence or business. "Universal services" are services regarded as indispensable for the public as basic services.

Additional services, such as ensuring access to their grid for the benefit of other service providers, must be provided by telecommunications service providers with significant market power according to section 21 of the Telecommunications Act.

2.18 Are there any obligations requiring number portability?

All undertakings that provide publicly available telecommunications services and assign telephone numbers to end-users (including all fixed and mobile network operators and VoIP service providers) underlie obligations that require number portability. The porting to another telecommunications service provider must be conducted without interruption (one day) (section 46 of the Telecommunications Act).

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The Federal Network Agency allocates frequency spectrum use according to section 52 *et seq*. of the Telecommunications Act.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Frequencies are typically assigned *ex officio* by the Federal Network Agency as *general assignments* for the use of particular frequencies by the general public or a group of persons defined by general characteristics, according to section 55 (2) of the Telecommunications Act. Where general assignment is not possible, frequencies for particular usages are *assigned individually* by the Federal Network Agency upon written application.

In case there is no sufficient spectrum available, the Federal Network Agency may order that an assignment be preceded by an *award procedure*, which is an *auction*, unless an auction is not likely to comply with regulatory aims. In this case, the Federal Network Agency invites tenders (so called "*beauty parade*").

On 15 July 2016, the Federal Network Agency published the "*Frequenz-Kompass*", which gives interested parties an overview of forthcoming frequency regulation activities. This document prepares the next spectrum assignment procedure for mobile broadband, serves as an initial orientation guide and identifies some early regulatory areas of action, especially the provision of 2 GHz and additional spectrum.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

No, as a licence is always needed.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

A one-time fee is payable as set forth in the Frequency Fee Ordinance ("*Frequenzgebührenverordnung*") and an annual fee is calculated in accordance to the Frequency Usage Contribution Ordinance ("*Frequenznutzungsbeitragsverordnung*").

3.5 What happens to spectrum licences if there is a change of control of the licensee?

A change of control does not affect the spectrum licence, but must be notified to the Federal Network Agency.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

According to section 55 (5) of the Telecommunications Act, frequencies shall only be *assigned* subject to:

1. their designation for the planned usage in the Frequency Usage Plan;
2. their availability;
3. their compatibility with other frequency usages; and
4. their efficient and interference-free use by the applicant being secured.

Furthermore, applicants are not entitled to any one particular frequency.

In theory, spectrum bands can be released for *trading, rent or communal use* by the Federal Network Agency ("*Bundesnetzagentur*"). Also, if a company were to restructure, they are permitted to transfer frequency usage rights by singular or universal succession, although this requires the consent of the Federal Network Agency according to section 55 of the Telecommunications Act. The conditions to transfer spectrum rights are set out in section 55 (8) of the Telecommunications Act. The *same rules* for the initial allocation basically also apply for transferring the spectrum rights, which makes it unusual that spectrum is sublicensed or transferred in Germany after initial allocation by the Federal Network Agency.

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In particular, many licences allocated by the Federal Network Agency are provided under certain obligations that have to be fulfilled by the tendering parties (for example, grid or network construction and putting into operation). Examples are the German companies Quam and Mobilcom, which both had to return their 3G spectrum licences (which they acquired for EUR 8.5 billion and EUR 8.4 billion, respectively) to the Federal Network Agency in 2007. The companies failed to fulfil the licensing obligations (in particular, setting up a grid available to 25% of the German population).

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Germany's strategy to ensure cybersecurity basically builds on its IT security law ("*IT-Sicherheitsgesetz*"), which was passed in 2015 and promotes cooperation between the German Federal Office for Information Security ("*Bundesamt für Sicherheit in der Informationstechnik*", abbr. BSI) and the industry in protecting critical infrastructure. To enforce the IT security law, the powers of the German Federal Office for Information Security were increased by amending the Act on the Federal Office for Information Security ("*Gesetz über das Bundesamt für Sicherheit in der Informationstechnik*", abbr. BSI-Gesetz or BSIG). But the protection of infrastructure only represents one part of the attempt to achieve cybersecurity.

According to sections 91 (2) and 93 (2) AktG, section 43 (1) GmbHG and section 317 (4) HGB, managers and chairmen can be responsible for ensuring cybersecurity in their companies. Section 203 of the Penal Code ("*Strafgesetzbuch*", abbr. StGB) criminalises the disclosure of personal secrets the perpetrator got to know in his professional function, e.g. as lawyers or physicians (even in case of hacker attacks).

Other aspects on cybersecurity are specified in the Telemedia Act ("*Telemediengesetz*", abbr. TMG), the Telecommunications Act ("*Telekommunikationsgesetz*", abbr. TKG), and Copyright Law ("*Urheberrechtsgesetz*", abbr. UrhG).

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The state authorities obtain access to private communications on different legal grounds, such as sections 100a and b of the Code of Criminal Procedure ("*Strafprozessordnung*", abbr. StPO), sections 3, 5 and 8 of the Act for Limitation of the Confidentiality of Correspondence, Post and Telecommunications ("*Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*", abbr. *Artikel 10-Gesetz*), sections 23a to c and e of the Act for the Customs Investigation Services ("*Zollfahnungsdienstgesetz*", abbr. ZFdG), section 20l of the Federal Criminal Office Act ("*Bundeskriminalamtgesetz*", abbr. BKAG) and some additional regulations of the individual Federal States.

The measures pursuant to section 100a of the Code of Criminal Procedure require a prior court order following an application by the public prosecutor's office. In pressing circumstances, the prosecutor may also issue an order, which must be confirmed by the court within three working days in order not to become ineffective (section 100b (1) of the Code of Criminal Procedure).

An order may only be granted in cases where certain facts give rise to the suspicion that a serious criminal offence referred to in section 100a (2) of the Code of Criminal Procedure has been committed (or, in cases where there is criminal liability for an attempt, there was an attempt to commit such an offence, or such offence had been prepared by committing a criminal offence), and the offence is one of particular gravity in the individual case as well, and other means of establishing the facts or determining the accused person's whereabouts would be significantly more difficult, see section 100a (1) of the Code of Criminal Procedure.

The access to private communications is specified in the Telecommunications Act and the Telecommunications Monitoring Ordinance ("*Telekommunikations-Überwachungsverordnung*", abbr. TKÜV).

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

All persons providing, or contributing to the provision of, telecommunications services on a commercial basis are required to assist the particular law enforcement authorities to implement the necessary measures required for the interception and recording of communications and to provide all necessary information without delay (section 100b (3) of the Code of Criminal Procedure). The measures that need to be taken are further specified in section 110 of the Telecommunications Act and the Telecommunications Monitoring Ordinance ("*Telekommunikations-Überwachungsverordnung*", abbr. TKÜV) and a technical directive. There are exceptions for operators with only a small number of end-customers.

Where the telecommunications service providers do not comply with interception and provision of information orders, regulatory and coercive actions can be taken, generally meaning certain fines can be imposed on the telecommunications service providers.

4.4 How does the state intercept communications for a particular individual?

In order to technically implement a judicial order, according to section 5 of the Telecommunications Interception Ordinance ("*Telekommunikations-Überwachungsverordnung*", abbr. TKÜV), the telecommunications service providers must provide the state authorities with a full copy of the telecommunications which are conducted via its telecommunications system under the identification to be intercepted. In so doing, it must ensure that the data provided contain only the telecommunications referred to by the judicial order. Thus, only the telecommunications service providers carry out wire-tapping in general. Yet, source telecommunications surveillance is implemented by the competent authorities themselves, e.g. the installation of trojans on computers.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are no rules governing the use of encryption. Section 13 (7) of the Telemedia Act states that there is no obligation to use certain encryption keys.

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4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

The German legislator adopted a new law on data retention ("*Gesetz zur Vorratsdatenspeicherung*"). The Federal Network Agency has stopped its enforcement after a ruling by the Higher Administrative Court of North Rhine-Westphalia ("*Oberverwaltungsgericht Nordrheinwestphalen*") stating that the law would not be consistent with EU law on data protection.

From 1 July 2017, all providers are formally required to save their customers' telecommunications transaction data listed in section 113b of the German Telecommunications Act for four weeks (concerning location data) or 10 weeks. Breaches of the retention obligation are punishable by a fine. The precedent provision on data retention was held to be unconstitutional by Germany's Federal Constitutional Court.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Audio-visual media are governed by the Interstate Broadcasting Agreement ("*Rundfunkstaatsvertrag*") and the Interstate Treaty on the Protection of Minors in Broadcasting and Telemedia ("*Jugendmedienschutz-Staatsvertrag*"). Furthermore, the Audio-visual Media Service Directive 2010/13/EU applies. See question 1.2 for further details.

It is not clear whether *online streaming services* must be qualified as *broadcasting services* that must be made subject to prior authorisation *or* if they can be qualified as *tele media services*. In contrast to radio broadcasts over the internet, TV broadcasts over the internet are not exempted from the obligation to obtain a licence (section 20b of the Interstate Broadcasting Agreement). "PietSmiet TV" has shut down its YouTube channel as a consequence of the Federal State media authority's notice requesting PietSmiet TV to either obtain a broadcasting licence or to shut down the channel. It is heavily disputed if this practice complies with article 5 of the German Constitution ("*Grundgesetz*", abbr. GG), which prohibits censorship.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Basically, the law is technology-neutral. German law, which is based on the EU's Audio-visual Media Services Directive (abbr. AVMSD), governs EU-wide coordination of national legislation on all audio-visual media, both traditional TV broadcasts and on-demand services. The new AVMSD is currently open for review. A new legislative proposal amending the AVMSD has been adopted by the European Commission on 25 May 2016. There is a chance that the AVMSD might distinguish between online video platforms in general and news platforms using videos.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The law generally distinguishes between 'tele media services' and 'broadcasting services'. *Broadcasting*, as defined in the Interstate Treaty, means a linear information and communications service that provides and transmits offers for the general public for simultaneous reception, in audio and/or video signals, pursuant to a programming schedule, using electromagnetic oscillations. *Tele media services* are defined as electronic information and communications services other than telecommunications services and broadcasting (e.g. internet content services).

According to section 20 of the Interstate Broadcasting Agreement, only providers of broadcasting services must obtain a licence. Yet, the term "broadcasting" does not include offers which:

1. are offered to fewer than 500 potential users for simultaneous reception in any case;
2. are destined for the immediate reproduction from reception equipment storage media;
3. exclusively serve personal or family purposes;
4. are not journalistic-edited offers; or
5. consist of programmes which are each activated against individual payment (section 2 (3) of the Interstate Broadcasting Agreement).

The provider's key obligations are set out in the provisions mentioned in question 1.2.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences are of personal nature and cannot be assigned to others. But, if the assignee himself meets the requirements of the Interstate Broadcasting Agreement, the state media authority ("*Landesmedienanstalt*"), as the competent regulatory authority, must issue a licence.

A possible change of control must be announced to the competent regulatory authority, which is the Commission on Concentration in the Media ("*Kommission zur Ermittlung der Konzentration im Medienbereich*", abbr. KEK). The Commission on Concentration in the Media – as representative of the Federal State media authorities – is responsible for reviewing issues related to securing diversity in the media and for avoiding predominant media power.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Following the recent judgment of the European Court of Justice (abbr. ECJ, C-484/14), operators of a public Wi-Fi hotspot are generally not liable for infringements committed by third parties in

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Germany. Yet, the ECJ states that the operator can be requested to secure his network with a password in order to prevent violations of the law.

Reacting to this judgment, the German legislator amended the German Tele Media Act, called the 'Second Act amending the Tele Media Act' ("*Zweites Gesetz zur Änderung des Telemediengesetzes*"), and provider liability was abolished. The law came into force on 27 July 2016 and concerns compensation for damages incurred by content providers through illicit use of internet access. But, the WLAN operator is still obliged to ensure that the illicit practices do not continue. The Federal Ministry of Economic Affairs ("*Bundesministerium für Wirtschaft und Energie*", abbr. BMWi) originally planned to exempt public Wi-Fi operators from legal obligations relating to the behaviour of users of their network, but changed its mind after the above-mentioned ECJ ruling.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Telecommunications operators and internet service providers are not obligated to disconnect customers who infringe a content owner's right. But, they have to provide information to content owners according to section 101 of the German Copyright Law ("*Urheberrechtsgesetz*", abbr. UrhG). If the requested information concerns traffic data such as IP addresses, copyright owners must obtain a court order.

The new data retention law 2017 prolongs the period during which telecommunications operators and internet service providers have to store traffic data to at least four weeks.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Originally, Deutsche Telekom had plans to impose speed limits on internet access via DSL. These were blocked by a judgment of the Regional Court of Cologne that declared the respective terms and conditions of Deutsche Telekom null and void. Yet, this judgment does not guarantee net neutrality in general.

Instead, net neutrality is guaranteed by the third law amending the Telecommunications Act, which sets out the rules on penalties under article 6 of EU regulation 2015/2120. In particular, it stipulates administrative fines for certain infringements of article 3 and article 4 of the EU regulation 2015/2120, with a possible maximum fine of €500,000.

The Federal Network Agency has received consumer complaints about alleged breaches of the open internet provisions of EU regulation 2015/2120. It has already investigated some of these cases and is still investigating others. Yet, no formal decision has so far been taken to impose a penalty for violation of net neutrality provisions. The Federal Network Agency has furthermore not yet taken any decision to impose requirements on technical characteristics, minimum quality of service, or other appropriate and necessary measures under article 5 (1) of EU regulation 2015/2120.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

As already mentioned in question 6.1, Wi-Fi operators can be obliged to ensure that copyright infringements do not continue; this was recently approved by the Federal Court of Justice ("*Bundesgerichtshof*", abbr. BGH). Consumer VPN services are not regulated or blocked.

Acknowledgment

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Greece

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The most recent official publicly available financial data covering the overall telecoms sector refers to the fiscal year 2015. The annual revenue of the sector has decreased to 5.1 billion. The most significant participants in the fixed communications market are the incumbent (OTE), Vodafone, Wind, Forthnet and CYTA Hellas. In the mobile communications market there are three MNOs: Cosmote (subsidiary of incumbent OTE), Vodafone and Wind. Furthermore, CYTA Hellas offers mobile services as an MVNO.

In the media sector, there is a significant difference between the development and regulation of distribution platforms and pay-tv on one hand and free-to-air TV content providers on the other hand. In February 2014 the EETT awarded the first licence for digital television network to Digea Digital Provider Inc (DIGEA). DIGEA provides networking and multiplexing, as well as network broadcasting for any legitimate TV station that uses its services. In the pay-TV market there are currently two main players ("NOVA" & "COSMOTE TV"). NOVA is affiliated with Forthnet (fixed communications operator) and COSMOTE TV is the pay-tv brand of the fixed incumbent OTE. There are many free-to-air content providers currently operating in the Greek market including local operators. A tender performed by the Ministry in 2016 for the award of four licences for free-to-air content providers has been annulled by the Council of State and a new process has been initiated by the National Radio-Television Council for the award of seven licences.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most important legislation applicable to telecoms, including internet and to the audio-visual media distribution sectors, consists of the following acts:

- Law 4070/2012 on electronic communications.
- Law 3115/2003 on issues related to the protection of communications privacy.
- Law 2472/1997 and 3471/2006 on the protection of personal data.
- Law 2121/1993 on the protection of intellectual property.
- Presidential Decree 131/2003 on e-commerce.
- Joint Ministerial Decision 70330 on alternative dispute resolution and online dispute resolution.
- Law 2251/1994 which applies to consumer protection issues.
- EETT Decision Number 750/2/2015 on the management and assignment of .gr domain names.
- Law 3592/2007 on licensing of media and other provisions.
- Law 4339/2015 on licensing of digital terrestrial TV content providers.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Ministry with the most direct involvement and key role in the telecoms and media fields is the Ministry of Digital Policy, Telecommunications and Information.

However, the major responsibilities in these sectors, are undertaken by regulatory agencies which are independent administrative authorities, with full independence from network operators and service providers. The agencies that regulate the communications and media sectors are the following:

- the EETT: the national regulatory authority that supervises and regulates the electronic communications and postal services market. It is also responsible for the application of competition law in the electronic communications sector and in the postal services sector;
- the ESR: an independent administrative authority that supervises and regulates the radio and television market;
- the Competition Commission: which is responsible for application of competition law in all sectors;
- the ADAE: an independent authority responsible for the protection of security and privacy of communications; and
- the DPA: an independent authority responsible for protection of personal data in all sectors.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

i. *Liberalisation*

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

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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 the liberalisation of communications was enacted in 2000. The EU Framework on electronic communications networks and services was initially transposed into national legislation with a significant delay in 2006. The revised Electronic Communications Framework was transposed into national legislation through Law 4070/2012.

In the media sector, the liberalisation of the market in Greece and the transition from the state-controlled radio and television to the regime of radio and television operated by privately owned companies has been the result of a *de facto* development in the market that occurred before the appropriate legal framework. An immediate effect of this is that the market developed in a totally unregulated way. Few of the free-to-air television stations still operate with a temporary licence, and the majority of the free-to-air radio and television stations operate legally under certain temporary provisions. In October 2015, Law 4339/2015 entered into force, introducing the provisions on the authorisation of digital terrestrial television broadcasting content providers. Law 4367/2016 amended Law 4339/2015 by adding a new Article 2A, 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 (4). The auction was performed and completed in September 2016, but the Council of State (Supreme Administrative Court), following appeal of the paricipants and existing TV operators, found that the process for the award of the licences by the Ministry 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 National Radio & Television Council (ESR). In July 2017, the ESR issued a decision defining that the number of TV licences to be awarded through the tender will be seven (7).

ii. *Foreign investment*

Both electronic communications and media sectors are open to foreign investment, subject to generally applicable restrictions. Special conditions related to ownership (applicable both to local and foreign shareholders) apply in the media sector. Law 3592/2007 provides that it is prohibited to control more than one licence in the television or radio sector. Participation in more than one licence is allowed to the extent that one does not exercise control, i.e. may not substantially influence the decision-making process or does not have the power to appoint at least one member of the board of directors or an administrator.

Furthermore, Law 4339/2015 sets the following restrictions on shareholders holding more than one per cent, board members and legal representatives of entities that participate in tenders for digital terrestrial TV content providers: i) non-convictions by irrevocable court decision for specific crimes; and ii) non-participation in any manner in companies conducting research in the radio or TV market and in advertising companies. The law also prohibits participation in companies that exectute public contracts and requires licence applicants to submit evidence proving the source of acquisition of the financial means used or intended to be used for the operation of the content provider.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Greece is a member of the World Trade Organisation. Being also an EU Member State, Greece also participates in that capacity through the representation of the European Union, which covers all Member States.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Electronic communications networks and services providers in Greece are required to obtain a general authorisation from the independent electronic communcations regulatory authority (EETT). The main law that governs the provision of electronic communications is Law 4070/2012. Secondary regulation is issued by the main competent regulatory authority (EETT). The law defines the responsibilities of the competent Ministries (currently the Ministry of Digital Policy, Telecommunications and Information) which are mainly related to defining the national strategy in the sector and the responsibilities of the EETT which is the key entity responsible for the design, implementation and enforcement of electronic communications regulation. The EETT has the power to issue regulatory decisions defining regulatory obligations or authorised operators, authorise operators, provide rights of use of numbers and spectrum, control the market and monitor compliance of authorised operators, enforce relevant obligations, impose sanctions and issue decisions on dispute resolution between authorised operators. In addition to the electronic communciations regulatory framework, the EETT is also the competent authority for the application of competition law in the electronic communications sector and is granted with all the powers of the Competition Commission to this end and to the extent required for the sector of electronic communications. Privacy issues in the electronic communications sector fall under the responsibility of the Authority for the Assurance of Communciaitons Privacy (ADAE).

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The intendent regulatory authority responsible for defining and implementing any sector-specific regulation in the electronic communications sector is the National Commission for Telecommunications and Post (EETT). EETT is also responsible for the application of competition law in the electronic communciations sector. 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. The Competition Commission is also an independent authority, but as the EETT it is not established by the Greek Constitution.

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2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

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. Decisions that impose fines, etc., can be challenged in their substance and with regard to the appropriate application of law and procedural rules at the Administrative Appeal Court. All regulatory decisions and any decisions brought before the Council of State are challenged only with regard to the appropriate application of law and procedural rules, and not on the substance (the facts) of the case.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The Greek legal framework provides for General Authorisations which are mandatory for any undertaking that wishes to offer electronic communications services. In order to obtain a general authorisation the requesting entity needs to submit a notification to the EETT, using the standard form provided by the EETT, along with the relevant supporting documents. Fifteen (15) days after the submission of a complete notification with all required documents and proof of payment of relevant administrative fees, the requesting operator is included in the Registry of Authorised Operators and may obtain a relevant certificate by the EETT upon request.

In addition to general authorisations, the law provides for Rights of Use of Spectrum and Rights of Use of Numbers, which are assigned individually to operators by decision of the EETT. Further analysis on Rights of Use of Numbers and Spectrum is provided below under the sections on numbering and spectrum respectively.

As far as licences for antennae 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.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Any natural or legal person can apply to acquire a general authorisation to provide electronic communications services or networks, by submitting a notification using a standard form provided by the EETT. The duration of General Authorisations is indefinite. Operators with a general authorisation are required to submit reports with requested data on a regular basis and pay licensing fees. Licensing fees are paid on an annual basis and derive 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.

The General Authorisation Regulation also provides in Annex B a list of specific obligations applicable per category of services provided by the authorised operator.

Operators with general authorisations are also allowed to use spectrum, except for the cases in which the use of spectrum requires the allocation of a Right of Use. Rights of use are allocated when they are required in order to: i) avoid harmful interference; ii) ensure the technical quality of services; iii) ensure efficient use of spectrum; and iv) and for other reasons pertaining to the public interest, as defined in the relevant European Framework.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Individual authorisations include Rights of Use of Numbers, Rights of Use of Spectrum and licences concerning base stations and antennas.

Rights of Use of Numbers are of indefinite duration. Transfer between users to whom numbers have been allocated at secondary level is only permitted under specific circumstances defined in the EETT Regulation on the allocation and use of numbers.

For Rights of Use of Frequencies, the duration and other terms vary depending on the decision-maker awarding the licences and the spectrum band in question. Rights of Use of Frequencies may be transferred. However, any intended transfer or change of control of the licensee has to be notified to EETT and is subject to relevant review and approval. The provisions on transfer do not apply to rights of use of spectrum that were allocated at no cost.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Law 4070/2012 and secondary administrative provisions cover the issue of Rights of Way for installation of telecommunications infrastructure in public property. The main provisions that define the framework for Rights of Way, Co-location and installation of base-stations and antennas are set by Articles 28–30 of Law 4070/2012. However, the complete framework consists of multiple special provisions varying from civil code provisions, special laws on archeological locations and responsibilities of local authorities, which often result to different interpretations by competent authorities and render their implementation challenging.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The interconnection market is regulated. Concerning the fixed market OTE is designated as having an SMP position in the fixed origination and termination markets. All other fixed network operators have been designated as having an SMP position in the markets for termination to their individual networks. Interconnection rates in these markets are regulated on the basis of cost-orientation. Additional obligations for transparency, price controls, cost accounting separation, access to and use of specific network facilities and non-discrimination have been imposed.

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In the mobile market, all MNOs and CYTA have been found to hold an SMP position in the markets for termination to their individual networks. Mobile termination rates are regulated on the basis of the cost-orientation principle and further obligations on access, transparency, non-discrimination, accounting separation have been imposed on SMP operators.

In cases of interconnection disputes the EETT can intervene through the standard dispute resolution procedure, provided for by the Law on Electronic Communications and in the Interconnection Regulation.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The fixed incumbent OTE and the three (3) MNOs (Cosmote, Vodafone, Wind) are required to publish their standard interconnection contracts and prices.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Charges for interconnection are subject to price regulation as indicated above (see answer to question 2.9). In addition to interconnection rates, the EETT has also regulated the fixed wholesale local access market in which the incumbent OTE was found to hold an SMP position. In this context, prices for LLU access and ancillary facilities such as co-location are regulated on the basis of cost-orientation. Wholesale broadband access is also regulated, including price and cost regulation. Accordingly, OTE was found to hold an SMP position in the market for terminating segments of leased lines, which has also led to cost regulation.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

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 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.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

In the most recent (fourth) round of analysis of the Market for wholesale fixed local access, the incumbent OTE was found to hold an SMP position. In this context, the EETT imposed on OTE the full set of *ex-ante* obligations, including access, transparency, non-discrimination, price control, cost accounting and accounting separation. Concerning particularly high-speed broadband networks, the EETT imposed additional obligations on the deployment of NGA Networks through VDSL Vectoring. Indicatively, OTE was required to provide information on its local access network for the purpose of assignment of specific local sites to other operators. The EETT manages the allocation process and operators who are allocated these sites undertake to deploy VDSL Vectoring infrastructure and to provide wholesale services under specified terms defined or approved by the EETT.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The majority of retail price controls which were imposed in the fixed markets have been lifted by the EETT, following the market analysis of retail fixed markets which concluded that the markets should not be subject to *ex-ante* regulation. The only retail market still subject to *ex-ante* regulation is the market for retail leased lines with a capacity of up to 2Mbps, in which the incumbent OTE has been found to hold an SMP position.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The provision of electronic communications services to consumers is subject to general provisions on consumer protection, to the special obligations imposed for each category of services under the General Authorisations Regulation and to Codes of Conduct for certain categories of services (such as the Code of Conduct for multimedia services).

Any operator with a General Authorisation with a turnover exceeding 15 million Euro is required to contribute to the cost for the provision of Universal Service. Universal service obligations include:

a) access at fixed locations and telephony services;
b) directory services;
c) public pay-phones and other points of access to public telephony; and
d) special provisions for disabled users.

Any operator may express interest for the provision for part or all of the services falling under universal service.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Number allocation includes primary and secondary allocation. Numbers and network identifying codes are primarily allocated by the EETT by awarding Rights of Use of Numbers following application of the providers which have obtained general authorisation covering services that justify the use of the requested number range. Providers may proceed to secondary allocation of numbers 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 (3) weeks from the date of submission of a complete application. The fees for allocation and use of numbering

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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.

2.17 Are there any special rules which govern the use of telephone numbers?

Special rules applicable to each category/series of numbers are defined in the EETT Regulation on Allocation and Usage of Numbers. These include designating number series for specific use, such as freephone, shared-cost, premium, adult content, special categories of short codes, etc.

Operators to which numbers are allocated are expected to use numbering resources efficiently. In case of non-efficent use, the EETT may refuse assignment of additional numbers or may revoke an allocation decision.

2.18 Are there any obligations requiring number portability?

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.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The National Commission for Telecommunications and Post (EETT) is the competent authority for spectrum management, frequency assignment, and spectrum monitoring, subject to certain key responsibilities maintained by the Minstry according the provisions of Law 4070/2012.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Spectrum is allocated by the EETT through the award of Rights of Use of Spectrum. Applications for rights of use of spectrum are 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 spectrum is required and is granted by the EETT. 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, which are set by Greek law in accordance with EU directives. In practice, in cases where there are a limited number of rights of use of frequencies, the EETT usually awards them through auctions.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Operators with general authorisations are allowed to use spectrum, without obtaining a right of use, except for the cases in which the use of spectrum requires the allocation of a Right of Use. Rights of use are allocated when they are required in order to:

i) avoid harmful interference;

ii) ensure the technical quality of services;

iii) ensure efficient use of spectrum; or

iv) for any other reasons pertaining to the public interest, as defined in the relevant European Framework.

Other special cases of exemption for licensing requirement are defined by law in a restrictive manner and for specific purposes.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The law provides both for allocation fees and for usage fees. Allocation fees are paid upon allocation of the frequency and usage fees are paid annually. The relevant cost is defined separately for each category of rights of use of spectrum.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The Electronic Communications Law provides that in case of change of control of the licensee, an approval is required by the EETT under the same process that is followed in cases of transfer of a spectrum right. For further information on the review and approval of EETT, please refer to question 3.6 below.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

The law allows for spectrum trading under specific conditions. In order to transfer, lease or make any change in the control of the rights holder, an application must be filed to the EETT, which considers the relevant application and decides based on specific criteria defined by law. The EETT needs to ensure that any new licensee will continue to fulfil the requirements set by law and by any tender performed for the award of licences. In addition to this, the EETT must ensure that any transfer or the licence or change of control will not raise concerns on the basis of competition law.

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4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The legal and regulatory framework that governs cybersecurity issues mainly consists of Law 4070/2012 (particularly Article 37 thereof) and ADAE Regulations 165/2011 and 205/2013. According to the applicable provisions of the above operators offering internet access networks and/or services should maintain and implement security policies, supported by relevant analytical procedures.

In addition to the above, provisions of Data Protection Law apply which require data controllers and processors to ensure the implementation of appropriate organisational and technical measures to ensure protection of personal data.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The lift of communications privacy which allows the competent state authorities to obtain access to private communications is strictly regulated and limited to specific purposes, involving the investigation of serious crimes.

The right of communications privacy is established by Article 19 of the Constitution. Lift of privacy for specific crimes and subject to defined procedures and conditions is governed by Law 2225/1994 (as amended by Law 3115/2003 and in force) and by the Presidential Decree 47/2005. Special provisions on the lift of privacy are also found in Law 3471/2006 on Data Protection in the Electronic Communciations Setor, Law 3674/2008 on the enhancement of the framework on privacy of telephony services, Law 3917/2011 on Data Retention and the Electronic Communications Law 4070/2012.

Operators are required to assist government to lawfully intercept telecommunications messages after the intervention of the public prosecutor by issuance of a written order, when a major crime is investigated and under the supervision of the ADAE. 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.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Regarding the rules and legislation applicable to legal interception by State Authorities please refer above to question 4.2. The relevant provisions do not explicitly refer to specific types of calls or communications and generally applicable to all types of electronic communications, including both the content and the external communication information (date, time, duration, location, etc.).

4.4 How does the state intercept communications for a particular individual?

Interception of communications for a particular individual is only permitted when the conditions of Law 2225/1994 are fulfilled, which means that a written order by the public prosecutor must be issued in the context of an investigation for serious criminal offences explicitly defined in the law or for reasons of national security. For further information please refer to question 4.2 above.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There is no explicit provision on the provision of encryption keys to the state. Encryption is only required as a technical measure to enhance the protection of electronic communications operators against security incidents and violation of communications privacy.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Law 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. 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 2006/24/EC) by the European Court of Justice, the national legal framework on data retention is under review, but remains in force. Accordingly, the relevant obligation includes the full list of data that was included in the Data Retention Directive which was fully transposed into national legislation.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

With respect to the conditions of liberalisation and licensing regime for audio-visual media, please refer above to question 1.4.

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 regulators 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, since 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. Therefore, the jurisdiction of the ESR is described in the Constitution and cannot change unless the Constitution is amended, something which is in itself, very difficult. This does not allow necessary changes in the legal regime that would lead to a more workable distribution of the issues that fall within the jurisdiction of the ESR and the EETT. The existing regime is drawn along the lines that content is regulated by the ESR and infrastructure and frequencies by the EETT. However, some types of licensing, and in all cases the licences for transmitting content, are still to a great extent granted by the ESR. On the other hand, whereas the EETT is responsible for applying the *ex-ante* rules for the liberalisation of the market, in all the electronic communications markets, including, therefore, that of broadcasting,

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and also the *ex-post* competition law, the CC is responsible for applying the *ex-post* competition.

In 2014 the EETT awarded the first licence for digital television network, which was awarded to Digea and defined the techno-economic model to be used in order to define the price caps to be charged by Digea to operators.

According to the applicable legislation, it is relatively simple to obtain a licence for pay-TV via cable or satellite, as it requires an application by a company having the form of a *société anonyme*, there is no limit on the number of licences granted and there is an obligatory period within which the licence must be granted jointly by the ESR and the Minister, or refused. Breach of this period without a response from the ESR is considered to be a silent approval. The decision is a joint decision of the ESR and the Minister, meaning in practice that the Minister is bound to issue a ministerial decision in line with the proposal of the ESR. 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 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 in order to avoid concentration, as well as the kind of programmes that will be transmitted. See also the answer to question 5.3 for further details on licensing framework.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Broadcast media advertising is regulated in accordance with Presidential Decree 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 for the registration of all online media. The relevant Register and its members were published in April 2017 on the website of the Ministry of Digital Policy. Only online media providers which are registered are eligible to receive state advertising.

According to the applicable legislation (Law 3592/2007) new media content and its delivery are regulated in the same way as traditional broadcast media.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

According to the applicable legislation (Law 3592/2007, Law 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 4339/2015, as mentioned above. The law provides for the award of licences through an auction conducted by the ESR, following the relevant ministerial decision. Special conditions shall be defined by the ESR, but the law sets requirements with respect to the legal form, the minimum capital, the requirement to identify shareholders, technical infrastructure, programme content, number of employed personnel, etc.

Law 4367/2016 amended Law 4339/2015 by adding a new Article 2A, 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 (4). 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 National Radio & Television Council (ESR). On 06 July 2017, the ESR issued a decision defining that the number of TV licences to be awarded through the tender will be seven (7).

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 109/2010, and apply to providers that are under the jurisdiction of Greece as defined therein. With a few exceptions, this also applies to the 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 a 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.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences are non-transferrable. The licensee may be transferred, subject to the provisions of Article1 paragraph 13 of Law 2328/1995. The transfer of the licensee should be notified to the General Secreteriat of Information and Communication within ten (10) days.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Greek legislation covers the issue of providers' liability in line with the provisions of Directive 2000/31/EC on e-commerce. Articles 11–14 of PD 131/2003 define the obligations and liability of online providers depending on the type of services they offer.

According to article 14 of PD 131/2003 providers have no general obligation to monitor information they transmit or store and no general obligation to actively seek for any facts or circumstances indicating any illegal action. However, subject to applicable provisions on privacy and data protection, service providers have to directly inform the competent state authorities of any suspected provision of illegal information or suspected illegal activities attempted by their users and to provide to public authorities upon request any information facilitating the identification of the users of their services. Restrictions of liability of information society

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providers do not deprive any offended third party from the right to impose judicially or by administrative order an obligation to cease or prevent any offence (article 11, paragraph 3, article 12, paragraph 2 and article 13, paragraph 3 of PD 131/2003). Additionally, following a petition by the offended parties, the courts may order any other appropriate injunctive measures. In such case, a preliminary order is issued in accordance with article 691 paragraph 2 of the Civil Procedure Code (article 17 of PD 131/2003, Decision of CFI 11339/2012).

Administrators of websites and blogs bear no civil, criminal or regulatory liability for third-party content hosted on their website, except in the following cases: when the user uploads illegal content under the authority or control of the website administrator; the website administrator in fact knows that the content is illegal and, as far as civil claims for damages are concerned, is aware of the facts and circumstances from which the illegal content derives; or the website administrator does not quickly withdraw or restrict access to illegal content, once it becomes aware of the fact that illegal content is hosted.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

In July 2017 Law 4481/2017 entered into force. The aim of this law is primarily to incorporate into national law the provisions of Directive 2014/26/EC on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. In addition to this, it introduces several amendments to the basic IP Rights Law (2121/1993). Law 4481/2017 provides, *inter alia*, sanctions for online violations of IP Rights and introduces a notice and take-down procedure to protect against IP rights violations.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

There are no relevant specific limits. The EU legislation is fully implemented.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

The PD 131/2003 provides for a notice-and-take-down procedure, which obliges ISPs to remove infringing material without court authorisation. The ISPs must be notified of the illicit nature of the material. The notification must respect strict requirements and include specific elements such as the date and description of the illicit material. Once ISPs are aware of the illicit nature of the material, they must remove or delete it promptly, or they can be held liable for the infringing material. Article 14 paragraph 2 of PD 131/2003 provides that, subject to the provisions on protection of communications' privacy and protection of personal data, ISPs and Information Society service providers should directly inform authorities on any suspicion for provision of illegal material or illegal conduct of their end users.

As indicated in question 6.2 a notice and take-down procedure was also recently introduced for cases of violation of Intellectual Property Rights.

Finally, Law 4002/2011 on Games of Chance imposes on ISPs an obligation to block access to specific sites. To this end the Hellenic Gaming Commission (HGC) regularly updates a "black list" which includes all unauthorised gambling providers. ISPs are required to check this list for any additions and ensure that access to the sites included in the black list is blocked. Non-compliance with this obligation results in very high fines and criminal sanctions.

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Hong Kong

Ashurst Hong Kong

Joshua Cole

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Telecommunications (including internet) sector:

The telecommunications market is fully liberalised and has no foreign ownership restrictions. According to the 2016 Global Information Technology Report, Hong Kong ranked third in Asia and 12th in the world in the World Economic Forum's Networked Readiness Index.

The gross output of the telecommunications sector in Hong Kong was HK$91 billion in 2016, representing 3.66% of GDP. There are currently four mobile network service operators: China Mobile Hong Kong Company Limited; Hong Kong Telecommunications Limited; Hutchison Telephone Company Limited; and SmarTone Mobile Communications Limited.

As of July 2017, there were 26 local fixed network operators, 258 external fixed telecommunications services providers (including facility-based external fixed network operators and services-based external telecommunications services providers) and two companies that were licensed to operate and provide satellite communication services. In addition, there were a total of 218 internet service providers comprising 192 services-based operator licensees, three fixed carrier licensees and 23 unified carrier licensees.

Audio-visual media distribution sector:

Licensed broadcasting services contributed an estimated HK$7.6 billion to the economy in 2015, representing 0.32% of GDP that year. The broadcasting sector has been subject to significant changes in the past few years, including the expiration of the broadcasting licence of Hong Kong's oldest television programme service provider, Asia Television, as well as the issue of new broadcasting licences to HK Television Entertainment Company Limited ("**HKTVE**") and Fantastic Television Limited ("**Fantastic TV**").

There are 43 licensed television programme service providers. The three domestic free television broadcasters are Television Broadcasts Limited, HKTVE and Fantastic TV. The two domestic pay television broadcasters are Hong Kong Cable Television Limited and PCCW Media Limited. There are also 15 non-domestic television broadcasters and 22 other licensable television broadcasters. There are 70 Satellite Master Antenna Television licensees providing over 400 free satellite television channels.

Sound broadcasting services are provided by two licensed commercial analogue radio broadcasters, namely Hong Kong Commercial Broadcasting Company Limited and Metro Broadcast Corporation Limited and one public service analogue radio broadcaster, Radio Television Hong Kong. Digital audio broadcasting services were discontinued in March 2017.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The following is the key legislation applicable to telecommunications, internet and audio-visual media distribution:

(a) **Telecommunications Ordinance (Cap. 106)**

Regulates the licensing and control of telecommunications, telecommunications services and telecommunications apparatus and equipment.

(b) **Broadcasting Ordinance (Cap. 562)**

Regulates the provision of broadcasting services by licensees.

(c) **Competition Ordinance (Cap. 619)**

Empowers the Communications Authority and the Competition Commission (which have concurrent jurisdiction) to investigate and bring enforcement proceedings against prohibited anti-competitive behaviour in the broadcasting sector before the Competition Tribunal.

(d) **Trade Descriptions Ordinance (Cap. 362)**

Prohibits unfair trade practices in connection with trades of goods and services. Also empowers the Communications Authority and the Customs and Excise Department (which have concurrent jurisdiction) to regulate commercial practices of licensees providing telecommunications or broadcasting services.

(e) **Unsolicited Electronic Messages Ordinance (Cap. 593)**

Regulates the sending of unsolicited electronic messages.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Communications Authority Ordinance (Cap. 616) combined the functions and powers of the former Broadcasting Authority and Telecommunications Authority when it was formed in 2012.

The Communications Authority is an independent statutory body which is responsible for regulating broadcasting and telecommunications affairs in Hong Kong. It is also responsible for

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enforcing the Unsolicited Electronic Messages Ordinance and shares concurrent jurisdiction with the Customs and Excise Department and the Competition Commission to enforce the relevant sections of the Trade Description Ordinance and the Competition Ordinance respectively.

Provisions of the Competition Ordinance relating to certain undertakings in the telecommunications and broadcasting sectors are primarily enforced by the Communications Authority which is empowered to investigate and conduct proceedings before the Competition Tribunal and can generally make any decisions and take any actions with respect to any relevant matter it deems necessary to enforce those provisions.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Telecommunications (including internet) sector:

All telecommunications sectors, including the internet, are fully liberalised. There are no foreign ownership restrictions and government policy has been to take a light-touch approach in this sector.

Audio-visual media distribution sector:

Varying ownership restrictions apply to different types of broadcasting (television and sound) licensees. However, it is a universal requirement for this sector that a licensee must be a company formed and registered under the Companies Ordinance (Cap. 622) (i.e. the licensee must be a Hong Kong company).

A domestic free or pay television programme service licensee is subject to the following control criteria:

(a) The control and management of the licensee must be *bona fide* exercised in Hong Kong.

(b) The majority of directors must actively participate in the direction of the licensee.

(c) A quorum of every meeting of directors (which must be at least two directors) has a majority of directors who are presently ordinarily resident in Hong Kong and who have been so resident for at least one continuous period of not less than seven years.

(d) The majority of both the directors and principal officers must be ordinarily resident in Hong Kong and have been so resident for at least one continuous period of not less than seven years, unless prior written approval was obtained from the Communications Authority.

(e) With respect to a domestic free television programme service licensee:

(i) an 'unqualified' voting controller, meaning a person not ordinarily resident in Hong Kong, must obtain approval from the Communications Authority before he or she can hold, acquire, or exercise more than 2% 'voting control'; and

(ii) he or she must not exercise in aggregate 49% or more 'voting control' in the licensee.

'Voting control' means the ability to directly or indirectly exercise voting power in a licensee.

For non-domestic television programme service and other licensable television programme service licensees, the control criterion is that one director or principal officer of these licensees must be ordinarily resident in Hong Kong and must have been so resident for at least one continuous period of not less than seven years.

An 'unqualified' voting controller of a sound broadcasting licensee is also subject to the control criterion set out in question 1.4(e)(ii) above.

Furthermore, sound broadcasting and domestic free television programme service licences are prohibited from being held by any subsidiary. This is to prevent indirect ownership in these licensees.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Hong Kong has been (and remains) a member of the World Trade Organisation ("**WTO**") since its founding on 1 January 1995. Hong Kong has made specific commitments under the General Agreement on Trade in Services regarding telecommunications services both in the Uruguay Round and the subsequent Forth Protocol on Basic Telecommunications and has also adopted and implemented the WTO's Basic Telecommunications Reference Paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The key pieces of legislation that regulate telecommunication networks and services are set out in the response to question 1.2 above. The Communications Authority from time to time also issues various statements, decisions, policies, guidelines, consultation papers and other information to supplement the regulations in this sector.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The telecommunications regulator is the Communications Authority, which is an independent statutory body whose role is, amongst other things, to facilitate the development of the Hong Kong telecommunications sector by adopting a light-touch and pro-competition regulatory approach.

Under the Telecommunications Ordinance, the Secretary for Commerce and Economic Development may:

(a) issue policy directions pursuant to which the Communications Authority is to carry out its functions and exercise its powers;

(b) prescribe general conditions for a carrier licence; and

(c) impose price controls on licensed network operators who are in a dominant position in the telecommunications market.

The competition law authority is the Competition Commission, which is an independent statutory body whose role is, amongst other things, to investigate prohibited anti-competitive conduct and enforce the provisions of the Competition Ordinance.

The Competition Tribunal, as part of the Hong Kong judiciary, hears and decides legal proceedings concerning competition matters.

The Communications Authority has concurrent jurisdiction with the Competition Commission to handle competition matters in the telecommunications sector regulated by the Competition Ordinance.

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2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions made by the Communications Authority with regard to exploitative conduct of a telecommunications licensee may be submitted for review by the Telecommunications (Competition Provisions) Appeal Board, an independent statutory body. The Appeal Board's decision is final but it may refer any question of law to the Court of Appeal and to the Court of Final Appeal (if leave to appeal is granted).

The Competition Tribunal has jurisdiction to hear and determine:

(a) applications made by the Competition Commission or Communications Authority concerning alleged contraventions of competition rules;

(b) applications for the review of reviewable determinations made by the Competition Commission or Communications Authority (e.g. decisions regarding block exemptions or variation of a commitment);

(c) private actions regarding contravention of the competition rules; and

(d) applications regarding the enforcement of commitments.

The Tribunal's decisions may be appealed to the Court of Appeal as of right.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Generally, public telecommunications services are provided either by facility-based operators ("**FBOs**") or service-based operators ("**SBOs**").

FBOs are licensed under unified carrier licences ("**UCLs**") to establish, maintain and provide fixed, mobile and coverage telecommunications services to the public. SBOs are required to be licensed to provide public telecommunications services using networks and facilities established by licensed FBOs and are not authorised to establish or maintain telecommunications. There are currently three different classes of services that an SBO can apply to provide.

There are also other types of more specific telecommunications licences available such as public radiocommunications service licences, aircraft station licences and hotel television (and transmission) licences.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

In order to obtain a UCL or SBO licence, an applicant must:

(a) be a company registered under the Companies Ordinance (which includes a company incorporated overseas but registered under the Companies Ordinance); and

(b) pay an application fee and an annual licence fee.

The Communications Authority does not impose a limit on the number of UCLs or SBO licences that may be issued. If the Communications Authority refuses an application, it must provide its reasons for refusal in writing.

For a UCL and each class of SBO licence, there are a set of general conditions and a set of specific conditions. The general conditions for a UCL are prescribed under the Telecommunications (Carrier Licences) Regulation (Cap. 106V), and the general conditions for SBO licences are regularly gazetted by the government. The Communications Authority may also attach additional special conditions for each of the above licences as it may deem appropriate.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

A UCL allows the licensee to establish, maintain and provide local fixed internal and external services, mobile and coverage services to the public. A UCL is valid for 15 years from the day of issuance with no automatic renewal upon expiration.

An SBO licence allows the licensee to provide local voice telephony services and other types of telecommunications services (including mobile virtual network operator services, public radio communication relay services, etc.) by using networks and facilities established by licensed FBOs. The validity of an SBO licence is one year and may be renewed for one year at a time, subject to the discretion of the Communications Authority and the production of supporting documents by the SBO licensee.

UCL licensees and SBO licensees cannot transfer or trade their licences without the Communications Authority's consent.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

A UCL licensee may enter public and/or private land to install and maintain in-building telecommunications systems (including cable, wire, support structure, ancillary telecommunications equipment and relevant facilities), provided that appropriate consent is obtained.

According to the Communications Authority's Code of Practice for the Installation and Maintenance of In-Building Telecommunications Systems and In-building Access by Telecommunications Network Operators, no UCL licensee is required to pay any money or offer an advantage to any landowner, his agent or lawful representative to allow the installation of any telecommunications system in common parts of a building. In addition, the building management office and the incorporated owners of the building should not impose any charges or fees on the UCL licensee for such access.

The Communications Authority also permits a UCL licensee to plant and maintain radiocommunication installations (including radio transmitter, receiver, aerial and ancillary equipment) over any land for the purpose of providing radio communications services to a public place. The UCL licensee shall pay an interim fee to the landowner of the land concerned for installing the radiocommunication facilities.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

UCL licensees and SBO licensees that provide local telephony services are required to achieve any-to-any ("**A2A**") connectivity

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(i.e. any customer in any one network can have access to any other customer in any interconnecting network). These licensees are also required to provide interconnection promptly, efficiently and on reasonable terms and conditions. The A2A connectivity requirement only applies in respect of the provision of voice services.

The Telecommunications Ordinance provides that where a licensee wishes to use or share a facility with another licensee, the latter shall endeavour to come to a commercial agreement on the conditions of use, including receiving fair compensation from the requesting licensee who reasonably requests the use or sharing of the facility concerned.

Intercommunications and access disputes are commercial disputes in nature and are to be dealt with initially between the parties. However, if the parties cannot agree on the terms and conditions for the use or sharing of the facility concerned, the Communications Authority has the power to determine such terms and conditions, including any compensation payable, on a 'fair and reasonable' basis.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

There is no requirement on operators to publish their interconnection contracts.

However, all UCL operators and SBOs are required to publish their tariffs, all relevant charges and service terms for the telecommunications services operated under their licences. A licensee is only required to publish the tariffs of those services which are intended to be offered to more than one customer.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

An SBO licensee providing external telecommunications services must pay the local access charges (and associated transit charges) to the local network operators (both fixed and mobile carriers) for their conveyance of originating and terminating external telecommunications services traffic to and from end users. The level of local access charge is subject to commercial agreement between the connecting parties.

Operators who are in a dominant position in the telecommunications market are subject to price or tariff control measures under the Telecommunications Ordinance.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The Communications Authority requires a dominant operator to maintain and report accounts for different service segments of its licensed operations. Non-dominant operators are required to maintain and report accounts for their overall licensed operations only.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Broadband networks are regulated by the Telecommunications Ordinance.

In line with the Communications Authority's light-touch regulatory approach, network sharing arrangements can be negotiated amongst network operators without restrictions, unless it is in the public interest for the Communications Authority to intervene. Generally, mobile network sharing takes various forms such as antenna sharing, site sharing, radio access network sharing, domestic network roaming and capacity leasing.

However, there are restrictions on spectrum assignment or pooling as mobile network operators should only transmit radio signals using the assigned spectrum as specified under their carrier licences.

There are no specific incentives or 'regulatory holidays' in connection with the sharing of or investment into passive infrastructure. In 2008, Hong Kong withdrew the Type II interconnection policy, which requires interconnection of telecommunications operators' network at the customer access network level. The objective of the withdrawal was to encourage new investment in advanced telecommunications infrastructure and to enhance consumer choice.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

There are no retail price controls imposed on any operator carrying fixed, mobile, or other services. However, the Secretary for Commerce and Economic Development may, on the advice of the Communications Authority, impose measures relating to price control on licensees whom it deems are in a dominant position in the telecommunications market.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The provision of electronic communications services is subject to data privacy laws under the Personal Data (Privacy) Ordinance (Cap. 486), which regulates the collection, holding, processing or use of personal data. Consumers are further protected by the Code of Practice for Telecommunications Service Contracts issued by the Communications Association of Hong Kong. The code includes clarifications on telecommunications service contract provisions including contract renewal terms, termination of contract and variation of contact terms and conditions. Service providers such as China Mobile Hong Kong Company Limited, CSL Mobile Limited and Hutchison Telephone Company Limited have adopted the code.

Electronic messages for furthering a business purpose (except for telemarketing calls or electronic messages issued in connection with sound broadcasting or television programme services) are subject to the Unsolicited Electronic Messages Ordinance, which requires the sender of such messages to provide their basic information, honour any unsubscribe requests and adhere to the do-not-call registers.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identifying codes are set out under the Numbering Plan produced and managed by the Communications Authority. The Numbering Plan sets out the plan of numbers and codes used or designed for use for or in connection with

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the establishment, operation and maintenance of any means of telecommunications under a licence or an order made by the Chief Executive in Council.

2.17 Are there any special rules which govern the use of telephone numbers?

The Numbering Plan mentioned in question 2.16 above provides requirements on:

(a) the format of particular types of telephone numbers; and

(b) which numbers can be used by particular types of licensees.

The Code of Practice Relating to the Use of Numbers and Codes in the Hong Kong Numbering Plan issued and regularly updated by the Communications Authority provides guidance to telecommunications network operators and service providers on how to follow the Numbering Plan.

2.18 Are there any obligations requiring number portability?

Licensees providing fixed or mobile services are required to facilitate operating number portability and mobile number portability amongst their network (as the case may be). In order for a customer to retain their assigned numbers or access codes when changing subscriptions from one network operator to another network operator, licensees need to either build their own database or enter into a commercial agreement with other licensees for access to that licensee's system. If the licensee chooses to build their own database, the Communications Authority may direct such licensee to provide an administration database (including servers, LANs and routers) to other licensees for facilitating number portability.

Licensed operators should also safeguard the security of third party data obtained from another licensee's database (which would include operating numbers) and must not disclose such data, or use the data for any promotional activities.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The Communications Authority regulates spectrum use and has the power to assign frequencies (or bands of frequencies) in all parts of the radio spectrum used in Hong Kong or on board a ship, aircraft or space object that is registered or licensed in Hong Kong, or to authorise the use of specified spectrum by a particular class of persons for particular uses (e.g. WiFi).

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Spectrum use is authorised by the Communications Authority. Spectrum is allocated according to the Communication Authority's Table of Frequency Allocations, which sets out the International Telecommunication Union's Radio Regulations that are applicable to Hong Kong, the allocations which have been adopted by Hong Kong and the band plans in use in Hong Kong.

Generally, the Communications Authority assigns spectrum that is in competitive demand to providers of non-government services by way of tender, auction, or a combination of both.

Spectrum for government services, non-government services required for public interests, or spectrum without congestion, are normally assigned on an administrative basis upon application.

The Communications Authority annually publishes updates to its spectrum release plan for unassigned spectrum available through competitive bidding or tendering over the next three years.

Applicants for a UCL are not automatically granted spectrum rights and must separately acquire such right.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Class licences may authorise the use and sharing of certain spectrum (e.g. WiFi) by persons covered by that class licence, subject to its conditions.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The Communications Authority may designate the frequency bands for which a spectrum utilisation fee is payable. The following principles apply in determining the applicable spectrum utilisation fees:

(a) generally, a spectrum utilisation fee is applicable to all non-government use of spectrum;

(b) for spectrum allocated by way of a competitive process, the fees payable will be determined in accordance with the terms and conditions of that process; and

(c) for spectrum allocated administratively, a fee may be applicable if the frequency bands meet certain criteria (e.g. when the frequency band is congested and the demand for the use of such band is expected to grow). The Secretary for Commerce and Economic Development may prescribe the level of spectrum utilisation fees or the method for determining the spectrum utilisation fees. The government plans to implement a charging scheme based on the least cost alternative approach by the end of 2017 or early 2018 for spectrum assigned administratively.

In addition, UCL licensees are also required to pay an annual spectrum management fee which is calculated based on the amount of spectrum used for providing their licensed services.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Spectrum licensees are normally required by the conditions of their licences to obtain consent from the Communications Authority before a change of control occurs.

Furthermore, if the change of control involves the merger of carrier licensees and has the effect of substantially lessening competition in the market, the Communications Authority may impose conditions on its approval for that change of control, such as requiring the relinquishment of certain spectrum by the licensee.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Unless the licence expressly permits, a licensee must obtain the prior written consent of the Communications Authority to transfer or assign a licence. In practice, transfer or assignment is not common.

In deciding whether to give its consent, the Communications Authority may consider matters including the market effect and the financial and technical competence and viability of the transferee.

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4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The Personal Data (Privacy) Ordinance is the main piece of legislation which governs data security. All organisations that collect, hold, process or use personal data must comply with the ordinance, which requires that all practicable steps be taken to ensure that personal data are protected against "unauthorised or accidental access, processing, erasure, loss, or use". Failure to take such steps could lead to an enforcement notice issued by the Privacy Commissioner for Personal Data, an independent statutory body which oversees the enforcement of the Personal Data (Privacy) Ordinance. It is a criminal offence to not comply with an enforcement notice.

Furthermore, computer crimes such as "accessing a computer with criminal or dishonest intent" and "making false entry in bank books (including electronic books)" are prohibited under the Crimes Ordinance (Cap. 200).

There are also a number of quasi-legal mechanisms regarding cybersecurity. For instance, the Securities and Futures Commission, an independent statutory body that regulates the securities and futures markets, has issued circulars and codes of conduct that relate to cybersecurity *vis-à-vis* regulated institutions/persons.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Interception of Communications and Surveillance Ordinance (Cap. 589) is the main piece of legislation which governs the government's ability to access private communications. It regulates the interception of communications and the use of surveillance devices by or on behalf of public officers. Subject to exceptions under the ordinance, communications interception and covert surveillance by public officers are generally prohibited.

The Commissioner on Interception of Communications and Surveillance is an independent authority which oversees the compliance of this ordinance and the Secretary for Security has also issued a code of practice providing practical guidance on this ordinance.

In addition, the Telecommunications Ordinance allows the Chief Executive to order the interception of messages for the execution of authorisations under the Interception of Communications and Surveillance Ordinance and for the detection of telecommunications services provided in contravention of the Telecommunications Ordinance.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

There are currently no rules which require market participants to maintain call interception (wire-tap) capabilities.

4.4 How does the state intercept communications for a particular individual?

Before intercepting communications (or conducting covert surveillance), a public officer ordinarily has to seek a prescribed authorisation. The authorisation must be given by a designated authorising officer of the applicant's department for less intrusive interceptions, or from a judge for more intrusive interceptions. These authorisations are issued for specific durations of up to three months and may be renewed for successive periods of up to three months each.

In an emergency where an application for authorisation would ordinarily have to be made to a judge, a public officer may instead apply to his head of department. The maximum duration of an emergency authorisation is 48 hours.

The Interception of Communications and Surveillance Ordinance also provides for other circumstances in which a public officer can intercept communications without a prescribed authorisation. This includes where the interception is permitted by another enactment such as an interception carried out in the course of the execution of a court order authorising the search of premises or the seizure of evidence.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There is no legislation that governs the use of encryption or the circumstances when encryption keys need to be provided to the government. However, the Import and Export (Strategic Commodities) Regulations (Cap. 60G) requires the import or export of certain encryption products to be licensed.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Under the Personal Data (Privacy) Ordinance, personal data can only be kept for as long as it is necessary to fulfil the purpose for which the data is to be used. Personal data means any data relating to a living individual from which it is practicable for the identity of the individual to be ascertained and which is in a form in which access to or processing of the data is practicable.

The Telecommunications Ordinance further provides that the Chief Executive in Council may make regulations concerning the period for which and the conditions subject to which messages and other documents connected with a telecommunications service shall be preserved. There are no such regulations at the time of writing.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Television and sound broadcasting services are regulated by the Communications Authority under a licensing regime described in the response to question 5.3 below.

The Chief Executive in Council is responsible for granting and renewing domestic television programme service licences on the recommendation of the Communications Authority. The Communications Authority is responsible for granting and renewing non-domestic and other television programme service licences.

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The Communications Authority's other responsibilities in this area include:

(a) issuing codes of practice on programme-setting, advertising and technical standards for broadcasting;

(b) dealing with complaints about broadcasting licences; and

(c) imposing sanctions on broadcasters.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Traditional television and radio broadcasting must be licensed under the Broadcasting Ordinance and the Telecommunications Ordinance respectively, but there is no licensing requirement for online television or radio.

Local newspapers (i.e. newspapers printed or produced in Hong Kong) must be registered with the Registrar of Newspapers under the Registration of Local Newspapers Ordinance (Cap. 268). The ordinance does not distinguish between newspapers distributed online or through traditional platforms.

Advertisements are primarily regulated by the Trade Descriptions Ordinance, which applies to both traditional and online content and prohibits the use of false and misleading trade descriptions.

Both traditional and online contents whether in the form of text, sound recording, video or pictures, are regulated by the Control of Obscene and Indecent Articles Ordinance (Cap. 390), which regulates the distribution of obscene and indecent content.

Online content is also indirectly regulated through the criminal offence of "accessing a computer with criminal or dishonest intent" under the Crimes Ordinance.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

There are four types of television licences (all granted under the Broadcasting Ordinance):

(a) domestic free television programme service licence;

(b) domestic pay television programme service licence;

(c) non-domestic television programme service licence (i.e. services that do not primarily target Hong Kong); and

(d) other licensable television programme service licence (e.g. services in hotel rooms).

A sound broadcasting licence is the only type of radio broadcasting licence and is governed by the Telecommunications Ordinance.

The obligations under these licences vary, but the key obligations will include:

(a) compliance with:

  (i) relevant codes of practice;

  (ii) programme language requirements; and

  (iii) investment-related obligations;

(b) providing:

  (i) mandatory programmes; and

  (ii) free television/testing equipment and assistance to the regulator for regulatory purposes when requested.

Apart from the obligations contained in the licences, the Broadcasting Ordinance and the Telecommunications Ordinance also regulate other aspects of television and radio services such as restrictions on cross-media ownership. The Chief Executive in Council's approval is generally needed before a 'disqualified person' (as defined separately under the Broadcasting Ordinance and the Telecommunications Ordinance) can exercise control of a sound broadcasting licensee, a domestic free television programme service licensee, or a domestic pay television programme service licensee.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Assignment of both television programme service licences and sound broadcasting licences are generally prohibited as a condition of those licences.

The Telecommunications Ordinance further provides that without the Communications Authority's consent, within three years of the grant of a sound broadcasting licence, any right, title or interest in shares exceeding 15% of the total number of voting shares in the licensee, as at the date of the grant of the licence, may not be transferred or acquired.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

'Mere conduits' of material such as telecommunications operators that provide a passive means for communication generally are not liable for defamatory material carried over their infrastructure.

Also, 'subordinate publishers' of content such as internet service providers may be able to rely on the defence of 'innocent dissemination' if they can prove that they had no knowledge of the libel statement and that this lack of knowledge was not due to negligence. To rely on this defence, internet service providers should promptly remove any defamatory material after they become aware of it.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Hong Kong case law suggests that courts may order internet service providers to disclose information regarding the identity and IP address of the alleged copyright infringers upon application by the alleged content owner.

An amendment bill to the Copyright Ordinance (Cap. 528) introduced in 2014 sought to, amongst other things, include safe harbour provisions limiting the liability of internet service providers for copyright infringement provided that they comply with certain conditions including:

(a) taking reasonable steps as set out in the code of practice published by the Secretary for Commerce and Economic Development to limit or stop a copyright infringement as soon as practicable after receiving notice of any alleged infringement; and

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(b) designating an agent to receive notices of alleged infringements and providing the agent's name and contact details in a publicly accessible location.

However, this amendment bill was later withdrawn and lapsed in July 2016.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

There are currently no net neutrality requirements. However, there are legislation and policies that regulate certain anti-competitive and discriminatory conducts of telecommunications operators and/or internet service providers:

(a) The Office of Communications Authority implements a 'Fair Usage Policy' which allows service providers to reduce access speed for customers whose data usage has exceeded a specific threshold.

(b) The Competition Ordinance prohibits certain prescribed anti-competitive conduct.

(c) The Telecommunications Ordinance prescribes licence conditions relating to interconnection and connectivity access.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

The Copyright Ordinance and the Control of Obscene and Indecent Articles Ordinance criminalises the distribution of unlicensed copyrighted material and obscene or indecent materials respectively. In these cases, operators and/or providers may be obliged to block access to those materials.

Consumer VPN services are not regulated or blocked.

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He was awarded *Finance Monthly* Deal Maker of the Year 2013 and was a finalist in the ALB Hong Kong Deal Maker of the Year in 2015. He has been named by *IFLR1000* as a leading M&A lawyer and *Chambers Asia-Pacific* as a leading telecommunications lawyer.

Joshua is praised for his "excellent commercial and strategic advice" and regularly speaks and writes about corporate and TMT matters in the region.

Ashurst is a leading international law firm with world class capability and a prestigious global client base. Our in-depth understanding of our clients and commitment to providing exceptional standards of service have seen us become a trusted adviser to local and global corporates, financial institutions and governments. Our people are our greatest asset and we bring together lawyers of the highest calibre who have the technical knowledge, industry experience and regional know-how to provide incisive advice.

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Indonesia

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(a) Telecoms and Internet

Mobile cellular business remains the largest telecoms industry in Indonesia. The telecoms sector in Indonesia is one of the world's most crowded cellular telecoms markets due to the country's large population and the affordable price in the technology devices market nowadays. There are approximately 278 million mobile subscribers in Indonesia, leaving only 11 million fixed line subscribers. Further, nearly 85% of the Indonesian population own mobile phones while 43% carry smartphones. This leads to the domination of mobile operators in the Internet Service Providers ("**ISP**") sector as well, meaning that most of the approximately 53 million internet users in Indonesia are utilising their mobile phones to gain internet access. Meanwhile, fixed line ISPs are aiming for corporate and residential customers, and apartment buildings. The fixed line ISPs are currently focused on enhancing their infrastructure by building fibre-optic networks of varying sizes and capacities in several of the largest cities in Indonesia.

Telkomsel, Indosat Ooredoo and XL Axiata are the three major operators for mobile subscribers in Indonesia, which dominate 80% of the telecoms market. Whilst Telkomsel is primarily owned by a publicly listed state-owned telecoms company, namely PT Telekomunikasi Indonesia Tbk (Telkom), the other two major operators are controlled by foreign telecoms companies. Axiata (a Malaysian-based telecoms company) owns 66.4% of XL Axiata's shares, whilst Ooredoo (a Qatar-based telecoms company) owns 65% of Indosat Ooredoo's shares. In respect of the annual revenue, Telkomsel has the biggest annual revenue among their competitors. In 2016, Telkomsel had IDR 86,725 trillion in their annual revenue while Indosat Ooredoo had IDR 29,184.6 trillion and XL Axiata had IDR 21,341 trillion.

(b) Audio-Visual Media Distribution

The rise of online digital advertising has not held back the domineering control of the television sector in the media landscape in Indonesia. With a total audience of almost 240 million people, the television sector is owned by many large and diversified media groups, the most significant of which are, among others, Media Nusantara Citra (MNC) Group and Trans Corp.

Subscription-based television services are also penetrating the market in numerous major cities in Indonesia, along with their bundled ISP services for residential customers. MNC Group, First Media Group, and recently Telkom, among others, are the big players for bundled cable television-ISP services in Indonesia. However, compared to the annual revenue for ISP service providers through mobile services, the bundled cable television-ISP service providers have been left far behind. For instance, the subsidiary of First Media Group and MNC group for this particular sector, respectively PT Link Net Tbk and PT MNC Sky Vision Tbk, only reached approximately IDR 3 trillion for their 2016 annual revenue.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms and Internet

- Law No. 36 of 1999 on Telecommunication ("**Telecoms Law**").
- Law No. 11 of 2008 on the Information and Electronic Transaction ("**EIT Law**").
- Government Regulation No. 52 of 2000 on Telecommunications Operation dated 11 July 2000 ("**GR 52/2000**").
- Government Regulation No. 82 of 2012 on Electronic System and Transaction Operation.
- Ministry of Communications and Informatics ("**MCI**") Regulation No. 01/PER/M.Kominfo/01/2010 on Provision of Telecommunication Network, as lastly amended by MCI Regulation No. 7 of 2015 ("**MCI Regulation 01/2010**").
- MCI Decree No. KM 21 of 2001 on Provision of Telecommunications Services as lastly amended by MCI Regulation No. 8 of 2015 ("**MCI Regulation 21/2001**").
- MCI Regulation No. 8/PER/M.Kominfo/02/2006 on Interconnection ("**MCI Regulation 8/2006**").
- MCI Regulation No. 19 of 2014 on the Handling of Negative Contents in the Internet Website ("**MCI Regulation 19/2014**").
- MCI Regulation No. 36 of 2014 on the Registration Procedure of Electronic System Operator ("**MCI Regulation 36/2014**").
- MCI Regulation No. 20 of 2016 on Individual Data Protection in Electronic System ("**MCI Regulation 20/2016**").
- MCI Circular Letter No. 3 of 2016 on Provision of Application and/or Content Services through Internet (Over the Top) ("**MCI Circular Letter 3/2016**").
- MCI Regulation No. 8 of 2017 on Provision of Internet Telephone Services for Public Purposes (VoIP) ("**MCI Regulation 8/2017**").

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(b) Audio-Visual Media Distribution

- Law No. 32 of 2002 on Broadcasting ("**Broadcasting Law**").
- MCI Regulation No. 28 of 2008 on the Procedures and Requirements for Broadcasting License ("**MCI Regulation 28/2008**").
- MCI Regulation No. 41 of 2012 on Provision of Broadcasting by Subscription Broadcasters through Satellite, Cable and Terrestrial ("**MCI Regulation 41/2012**").
- MCI Regulation No. 18 of 2016 on the Procedures and Requirements for Broadcasting Operation ("**MCI Regulation 18/2016**").
- MCI Regulation No. 6 of 2017 on Provisions of Internet Protocol Television ("**MCI Regulation 6/2017**").

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms

- Minister of Communication and Informatics (*Kementerian Komunikasi dan Informatika* / "**MCI**"), Directorate General for Operation of Post and Telecommunication.
- MCI, Directorate General for Operation of Post and Telecommunication.
- MCI, Directorate General for Informatics Application.
- Indonesian Telecommunication Regulatory Authority (*Badan Regulasi Telekomunikasi Indonesia* / "**BRTI**").

(b) Audio-Visual Media Distribution

- MCI, Directorate General for Operation of Post and Telecommunication.
- Indonesian Broadcasting Committee (*Komisi Penyiaran Indonesia* / "**KPI**").

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(a) Telecoms and Internet

Most of the telecoms sectors, including fixed and mobile telecommunications network providers, telecommunications services providers, and ISP providers are restricted to 67% foreign ownership.

(b) Audio-Visual Media Distribution

The Private Broadcasting Channel ("**PBC**") and subscription broadcaster sectors can only be invested in by a local citizen or Indonesian-owned legal entity. Foreign investors may only participate in PBC and subscription broadcaster sectors by means of capital injection, with a 20% foreign shares ownership restriction.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Indonesia has been a member of the World Trade Organisation ("**WTO**") since 1994 and entered the WTO Basic Telecommunication Agreement in 1997. The Indonesian government has opened up the telecommunications industry to even more than the agreed 35% foreign ownership. See question 1.4 above for details on the foreign ownership restriction in the telecommunications industry.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

By virtue of the Telecoms Law, GR 52/2000, MCI Regulation 01/2010 and MCI Regulation 21/2001, the following are the classifications of telecoms operations under the said laws and regulations:

1. The Operation of Telecoms Networks, which consist of:

(a) Fixed Telecommunications Networks, which consist of:
  (i) fixed local networks;
  (ii) fixed long distance networks;
  (iii) fixed international networks; and
  (iv) fixed closed networks.

(b) Mobile Telecommunications Networks, which consist of:
  (i) mobile terrestrial networks;
  (ii) mobile cellular networks; and
  (iii) mobile satellite networks.

2. The Provision of Telecoms Services, which, among others, consists of:

(a) Basic Telephony Services, which are provided by:
  (i) fixed local network operators (telephone, facsimile, telex, telegraph and data);
  (ii) fixed long distance network operators (telephone, facsimile, telex, telegraph and data);
  (iii) fixed international network operators (telephone, facsimile, telex, telegraph and data);
  (iv) mobile cellular network operators (telephone, facsimile and data);
  (v) mobile satellite network operators; and
  (vi) radio trunking operators (local telephony).

(b) Value Added Telephony Services, which, among others, consist of:
  (i) premium calls;
  (ii) calling cards;
  (iii) virtual private phone numbers;
  (iv) public telephone recordings;
  (v) store-and-forwards; and
  (vi) call centres.

(c) Multimedia Services, which, among others, consist of:
  (i) internet service providers (ISP);
  (ii) internet interconnection services (NAP);
  (iii) internet telephony for public purposes; and
  (iv) data communication system services.

3. Special Telecoms Operations, which consist of:

(a) Special Telecommunications for Internal Use;

(b) Special Telecommunications for National Defence; and

(c) Broadcasting.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha* / "**KPPU**") is an independent

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governmental body established pursuant to Law No. 5 of 1999 regarding Prohibition on Monopolistic Practices and Unfair Business Competition ("**Anti-Monopoly Law**"). KPPU rules over business competition in any field in Indonesia. With an open-recruitment mechanism, KPPU's members are inaugurated by the President, with approval by the House of Representatives.

Specifically for the telecoms sector, competition supervisory duty in this area is conducted mutually by KPPU and BRTI. As a semi-independent regulatory body, BRTI runs its tasks and functions through the Committee of Telecommunication Regulation, which consists of seven members. Public participation is manifested through the appointment of five members of the committee from public figures, and two members of the committee from the government.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

In accordance with Law No. 5 of 1985 regarding the State Administrative Court as most recently amended by Law No. 9 of 2004 ("**State Administrative Court Law**"), the decision of the national regulatory authority shall be considered as a state administrative decision, thus able to be appealed at the State Administrative Court.

According to Article 1 No. 3 of the State Administrative Court Law, a state administrative decision is defined as a written decision that is issued by a state administration agency, which contains state administration legal actions based on the applicable laws and regulations. Further, such decision must be concrete, individual, and final in character, and has legal consequences for a specific person or legal entity. Examples of state administrative decision are (i) licences/permits, and (ii) ministerial decrees on legal status, rights and obligations for a certain legal entity.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

In general, telecoms licences for commercial use are issued in three stages, which are:

(i) Principal Licence

A Telecoms Principal Licence will be issued by MCI to give groundwork for the telecoms operator/provider in commencing its initial preparation and developing its facilities and infrastructure for the intended telecoms business activity. The Principal Licence shall be valid for a maximum period of one year.

(ii) Fit and Proper Test

Serves as the basis for the issuance of an Operating Licence, the fit and proper test is a technical inspection conducted by either a team composed by MCI or accredited assessment institutions, whichever is deemed fit.

(iii) Operating Licence (Modern Licensing)

The Telecoms Operating Licence shall be in the form of a contract between the relevant telecoms network/services provider with MCI, consisting of operational rights, obligations, sanctions and report. This contract will be subject to an evaluation every five years.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

The main requirements for both Telecoms Networks and Telecoms Services sectors in obtaining telecommunication licences are as follows:

(i) a business plan that includes scope of development area and services to be built (roll-out plan), which constitutes a commitment to develop for a five-year period; and

(ii) a statement letter that it will not change its shareholding structure during the Principal Licence period and, upon obtaining the Operating Licence, before fulfilling at least 50% development responsibility of the total commitment to develop during the five-year period.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Currently, there are no individual authorisations used in Indonesia with regard to telecoms business activities.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The construction of telecommunication infrastructure in certain areas, particularly in less-developed cities, may be considered as a development for public interest, hence granting the Indonesian government the authority to acquire land by giving proper compensation to the relevant land owners. There are two regulations which are relevant for public and private land acquisition for public interest, namely:

(i) Law No. 2 of 2012 on Land Procurement for Development for Public Interest and its implementing regulations.

(ii) Presidential Regulation No. 71 of 2012, as lastly amended with the Presidential Regulation No. 148 of 2015.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Under the Telecoms Law, it is clearly mandated that every telecoms network operator shall provide interconnection, based on demand, to any other operator. The interconnection is further regulated under MCI Regulation 8/2006, which also contains the provision regarding interconnection dispute settlement. Pursuant to Annex V of MCI Regulation 8/2006, disputes related to interconnection issues may be resolved by means of mediation or arbitration, without prejudice to the relevant parties' rights in seeking a resolution through the Indonesian District Court. In mediation, the mediator team shall be established by BRTI. Meanwhile in arbitration, the arbitral tribunal members shall consist of one or more arbitrators appointed by BRTI.

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2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Operators are required to submit interconnection tariffs offers, which include the Interconnection Offer Document (*Dokumen Penawaran Interkoneksi* / "**DPI**") to be reviewed by BRTI. An operator's DPI with operating revenue of 25% or more from the total revenue of the entire operators in its particular service sector is required to be approved by BRTI.

All operators are also required to publish their DPI and other supporting documents from the interconnection contract for all interested parties and it is advisable to publish the documents on the operator's website.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Interconnection tariffs are decided on a cost basis by considering the economic value (supply and demand) and are subject to the standard formulation provided by the government. The basis of interconnection tariff calculations are transparency and fairness, as the calculation result shall be included in DPI. Operators are then required to submit the DPI to be reviewed and approved by BRTI.

In calculating the interconnection tariff, reference shall be given to the (i) cost allocation and reporting manual, and (ii) guidelines and calculation formula software for the interconnection tariff, as determined by the Directorate General for Operation of Post and Telecommunication.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

In several lines of telecoms business, MCI requires the operator and/or telecoms service providers to conduct accounting separation, e.g., interconnection services. However, the operators are not subject to any sectoral regulations to undertake any functional separation and/or legal separation.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

There is no specific regulation regarding high-speed broadband networks, nor any incentives or regulatory holidays for this matter.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Pursuant to the Telecoms Law, telecom network operators have the right to determine the tariffs and there is no set price control or retail tariffs on the operators. The government only determines the formula to calculate the tariff.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The Telecoms Law stipulates that in providing its services, each telecoms operator is required to protect its customers' rights, among others, quality of services ("**QoS**"), tariffs and compensation. In relation thereto, MCI has set up several regulations on QoS for certain telecoms services.

Further, in the event that the provision of electronic communications services is considered to be public services, the relevant electronic system operator shall be subject to a mandatory registration to the MCI. Based on MCI Regulation 36/2014, provision of the following services shall be considered as public services and subject to registration:

(a) The web portal, website, or online application via the internet that is used to facilitate offering and/or trading of goods and/or services.

(b) The electronic system that contains payment facility and/or other financial transaction online by means of communication data or the internet.

(c) The electronic system used to process electronic information which contains or requires deposit of funds or other similar forms of funds.

(d) The electronic system used to process, administer, or store data related to facilities that are associated with customer data for public-serving operational activity on financial transactions and trading activity.

(e) The electronic system used for the delivery of payable digital material through a data network, either by means of download via web portal/website, email transmission, or other application to the user device.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identifying codes are allocated by MCI through the Directorate General for Operation of Post and Telecommunication. Procedures for allocation and designation of numbers are stipulated under MCI Decree No. 4 of 2001 on the National Fundamental Technical Plan 2000, as lastly amended by MCI Regulation No. 17 of 2014. Usage and arrangement of such numbers shall be carried out further by the respective operators.

2.17 Are there any special rules which govern the use of telephone numbers?

Upon obtaining the allocated numbers, the operators are obligated to submit a report of the usage of the telephone numbers every six months.

2.18 Are there any obligations requiring number portability?

Number portability, including local number portability and mobile portability, is not applicable for either individual or enterprise customers in Indonesia.

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3 Radio Spectrum

3.1 What authority regulates spectrum use?

MCI, Directorate General for Resources and Postal and Informatics Devices.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Based on MCI Regulation No. 4 of 2015 on the Operational Requirements and Licensing Procedures for the Use of Radio Frequency Spectrum ("**MCI Regulation 4/2015**"), every usage of the radio spectrum in Indonesia is required to obtain a usage of radio frequency spectrum licence. There are three types of licences for the usage of radio frequency spectrum, namely:

- Radio Frequency Band Licence (*Izin Penggunaan Pita Radio* / "**IPFR**"), for the usage of radio spectrum in the form of a radio frequency band.
- Radio Station Licence (*Izin Stasium Radio* / "**ISR**"), for the usage of radio spectrum in the form of a radio frequency channel.
- Class Licence (*Izin Kelas*), granted to individuals and/or legal entities to operate a telecoms device which uses the radio frequency spectrum.

The holder of the above licence is required to pay the Rights of Frequency Radio Spectrum Fee (*Biaya Hak Penggunaan Frekuensi Radio* or "**BHP**").

The procedure to determine the candidates entitled to use radio spectrum is based on the selection mechanism and on a "first-come first-served" basis.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

No, for every usage of the spectrum, one must first obtain the related licences.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

According to MCI Regulation 4/2015, only IPFR and ISR are payable with licence fees in the form of Right of Frequency Radio Spectrum Fee (*Biaya Hak Penggunaan Frekuensi Radio* / "**BHP**"). The BHP must be fully paid in advance via a bank with a host-to-host payment gateway on an annual basis.

The amount of BHP for IPFR shall be determined by the following mechanisms:

- selection process mechanism, by taking into account the public's purchasing power and reasonableness;
- adjustment of selection result mechanism, for the usage of radio frequency spectrum on the same radio frequency band; or
- calculation mechanism, in accordance with the formula determined by MCI.

Meanwhile, the amount of BHP for ISR shall only be determined by the calculation mechanism in accordance with the formula determined by MCI.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

In the event the change of control of the licensee results in (i) the change of name of the licensee, (ii) the person in charge of the legal entity holding the ISR (only for ISRs), and/or (iii) domicile of the licensee, then the licensee must submit the change of licensee data.

The change of licensee data shall be submitted to MCI in the case of IPFR, or the Directorate General of Resources and Postal and Informatics Devices in the case of ISR.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

No, spectrum licences are not able to be assigned, traded or sub-licensed.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

There is no specific law or regulation for cybersecurity in Indonesia. The main reference for cybersecurity in Indonesia still refers to EIT Law, which serves as the principal policy for electronic information in Indonesia.

Nevertheless, the President of the Republic of Indonesia recently issued Decree No. 53 of 2017 on Cyber Body and National Encryption Agency (*Badan Siber dan Sandi Negara* / "**BSSN**"), a non-ministerial agency which is directly accountable to the President through the MCI for cybersecurity issues. The main role of BSSN is to effectively and efficiently implement cybersecurity in Indonesia and carry out the function of drafting and implementing technical policy in the field of identification, detection, protection, countermeasures, control, monitoring, evaluation, control of e-commerce protection, coding, screening, cyber diplomacy, cyber crisis management centre, cyber contact centre, information centre, mitigation support, vulnerability recovery, incident and/or cyber-attacks.

Additionally, provisions regarding data protection are scattered throughout several ministerial regulations. For instance, MCI Regulation 20/2016 requires all electronic system operators in Indonesia to store all personal data in their possession in an encrypted form, although there is no further stipulation on the encryption mechanism to be implemented. Further, MCI Regulation 4/2016 requires electronic system operators for public services that utilise strategic or high-level electronic systems to employ SNI ISO/IEC 27001 as their standard of information safety management system.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Lawful interception is permitted and applicable in Indonesia, provided that such interception is conducted by an authorised law enforcer for the purpose of law supremacy and national security. The legal basis for lawful interception is scattered throughout several laws and regulations. Among others, the following are regulations which authorise lawful interception:

- EIT Law;
- Law No. 30 of 2002 on Corruption Eradication Commission;

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- Law No. 35 of 2009 on Narcotics; and
- MCI Regulation No. 11/PER/M.Kominfo/020/2006 on Information Obtained through Confidential Interception.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Telecoms Law and GR 52/2000 permit the telecoms services provider, for the purpose of criminal proceedings, to record any information delivered or received by it, as well as providing any necessary information upon the following conditions:

- written request from the Attorney General and/or Head of the Indonesian Police Force for certain criminal acts with five years or more of imprisonment, a life sentence or the death penalty; and
- a request from the lawful investigator for certain criminal acts pursuant to the prevailing laws and regulations.

Telecoms Law and GR 52/2000 expressly state that any kinds of information may be recorded and disclosed for criminal proceeding purposes. Accordingly, this interception covers all types of communications facilitated by the relevant telecoms services provider.

4.4 How does the state intercept communications for a particular individual?

Since the telecoms services provider must cooperate for criminal proceeding purposes, the lawful authority may cooperate with the network operators or ISPs to intercept the communications for a particular individual.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

MCI Regulation 20/2016 requires all electronic system operators in Indonesia to store all personal data in their possession in an encrypted form. However, the regulation does not further stipulate the encryption mechanism that needs to be implemented.

With the obligation of the service providers to cooperate with the state under Telecoms Law and GR 52/2000, the telecoms services provider must cooperate during criminal proceedings by providing the state with any encryption keys required in order to provide any necessary information in an encrypted form.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Should there be no statute that specifically governs it, MCI Regulation 20/2016 sets out that the retention period of personal data shall be at least five years. By the time a personal data owner is no longer considered a user, the electronic system operator is obliged to store the relevant personal data starting from the last date of the personal data owner that is considered a user.

In particular for telecoms and internet operators, GR 52/2000 requires them to maintain and store a customer data record ("**CDR**") or details of the telecommunication usage. Storage of the CDR shall be kept for a period of at least three months.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Media sectors, including the distribution of audio-visual media in Indonesia such as radio and television broadcast, are regulated under Broadcasting Law. The Broadcasting Law divides broadcasters into public broadcasters ("**PubBC**"), PBC, community broadcasters and subscription broadcasters. The broadcasting sector is under the auspices of KPI, an independent body whose responsibility is to regulate and provide recommendations in the area of broadcasting.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

In general, as provided in the Broadcasting Law as well as the EIT Law, both content broadcast via traditional media (e.g., television and radio) and digital media (e.g., the internet or other digital platforms) shall not violate the limitations provided by laws (e.g., advertisement on alcoholic beverages and cigarette promotion) or in conflict with public order, morality, religion or the customs in Indonesia. However, in the area of broadcasting, there are several provisions concerning the minimum local content required to be aired. For example, broadcast content of PBC and PubBC television must contain at least 60% domestic programmes. The KPI also issued the Broadcasting Behaviour Guidelines and Broadcasting Programs Standard ("**P3SPS**") in order to guide broadcasting behaviour.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

MCI Regulation 28/2008 sets out that in order to conduct its broadcasting activities, a company shall obtain a broadcasting licence. A broadcasting licence for radio shall be granted for five years, while for television broadcasting licences shall be granted for 10 years, and both licences are extendable. Prior to obtaining a permanent broadcast licence, a radio broadcaster must pass a broadcasting probation period (which can be as long as six months), while a television broadcaster must pass a one-year broadcasting probation period.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

No, a broadcasting licence is not assignable.

The change of control on a PBC is restricted for a maximum 20% of shares of foreign capital. See question 1.4 above for details on PBC foreign ownership restriction.

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6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Generally, the content shown in their networks are not under the responsibility of telecoms operators and/or ISPs. However, MCI Regulation 19/2014 requires telecoms operators and/or ISPs to block all of the IPs/URLs contained in the TRUST+Positif List, which is a list made by MCI, Directorate General of Informatics Applications, of websites with negative content (pornography, racism, etc.). Accordingly, telecoms operators and/or ISPs are only liable for the IPs/URLs contained in the TRUST+Positif List.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Not without an instruction from the MCI, as the telecoms operators and/or ISPs are only under the obligation to block IPs/URLs contained in the TRUST+Positif List. However, content owners may report the domain or URL that contains any rights infringement to the MCI, hence the relevant domain or URL may be included in the TRUST+Positif List.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

No, currently there are no net neutrality requirements applicable to Indonesia. Telecoms operators and/or ISPs are granted the rights to block different types of traffic over their networks.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Yes, telecoms operators and/or ISPs are under the obligation to block access to certain sites as per the TRUST+Positif List. Currently, there are no regulations regarding customer access to VPN services.

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As part of the recognition of his representation for multinational clients in Information Technology, Telecommunication and Media, Enrico's team has been recognised by the ***Asia Pacific Legal 500 2017 edition*** as Indonesia's **1st Tier** law firm in ***IT & Telecoms*** practice. He has also been selected in the ***2013, 2014, 2015*** *and* ***2016 editions*** of ***The International Who's Who Legal***, as a leading individual in Information Technology practice, and in the ***2014*** *and* ***2015 editions*** on the same publication, as a leading individual in ***Telecoms & Media*** practice.

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Bimo is a principal associate of Bagus Enrico & Partners. Mainly focusing on technology, media and telecommunication areas, Bimo has been actively involved in advisory for regulatory issues across TMT aspects including telecommunication and networks operation, data privacy protection, cloud services, and e-commerce industries.

Bimo also regularly advises the firm's clients within a wide spectrum of corporate and commercial matters on various sectors; namely, mergers and acquisitions, property, hotels and real estate, and employment, as well as advising various mainstream corporate clients.

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Chapter 15

Italy

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

According to the last Annual Report of the Italian Communications Authority ("**AGCom**"), in 2016 the total revenue in the sectors regulated by AGCom – which include telecoms and audio-visual media service (see question 1.2 for in-depth details) – represented 3.2% of the Italian GDP.

(a) Telecoms market

In 2016, the revenues of such market were equal to EUR 31.86 billion.

The main players in the telecoms market are Telecom Italia, Vodafone, Fastweb, Wind and H3G (the two last companies merged in 2016).

(b) Media market

In 2016, the revenues of the media market were equal to EUR 14.9 billion (5% higher than in 2015), 49% of which came from advertising, 37% from sales of services, and 14% from fees and public contributions. Such revenues refer to radio and television, the publishing industry and internet.

Specifically, the audio-visual media sector is the most influent one since its revenues are equal to roughly EUR 8 billion (49.5% of the total). The main players are the 21st Century Fox group (Sky Italia and Fox Networks Group Italy), Mediaset and RAI.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The electronic communications sector is governed by Legislative Decree No. 259/2003, i.e. the Electronic Communications Code ("*Codice delle comunicazioni elettroniche*", "**ECC**"), which has implemented the EU regulatory framework.

Other important pieces of legislation are:

- Law No. 249/1997, establishing the Italian Communication Authority;
- Legislative Decree No. 206/2005 re: consumer protection (the "**Consumer Code**");
- Legislative Decree No. 196/2003 (the "**Data Protection Code**"), which provides for rules concerning the protection of personal data processed by operators in the context of the provision of electronic communications services; and
- Legislative Decree No. 70/2003 (the "**E-commerce Decree**"), which provides for the rules governing liability of internet service providers (*i.e.* access, caching and hosting providers).

Audio-visual sectors are governed by Legislative Decree No. 177/2005, i.e. the Consolidated Law on Radio and Audio-visual Media Services ("*Testo unico dei servizi di media audiovisivi e radiofonici*", "**TV Code**"), as amended *inter alia* by Legislative Decree of March 15, 2010, No. 44, which has implemented the Audio Visual Media Service Directive (Directive No. 2010/13/EU, "**AVMS Directive**") in Italy.

AGCom resolutions regulates several specific matters in detail.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The main regulators that have a role in the regulation of telecoms and audio-visual media distribution are the following:

- the Ministry of Economic Development ("*Ministero dello Sviluppo Economico*" – "**MiSE**") deals with electronic communications, including – among others – allocating frequencies, monitoring and control of the national radio spectrum, managing the infrastructure programme for broadband. MiSE is also in charge of the general authorisations for electronic communications networks and services, and issues the authorisations to operate digital terrestrial TV channels;
- AGCom is, *inter alia*, the regulator and watchdog in charge of the audio-visual media and electronic communications services. AGCom is also in charge of preventing online copyright infringements;
- the Italian Data Protection Authority ("**IDPA**"), an independent authority dealing with the protection of personal data of individuals; and
- the Ministry of Cultural Heritage and Activities and Tourism ("*Ministero dei Beni e delle Attività Culturali e del Turismo*" – "**MiBACT**") also plays a role in the audio-visual sector.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The telecoms sector has been liberalised; notification to MiSE is

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sufficient to operate an electronic communications network or provide electronic communication services (general authorisation regime).

The provision of audio-visual media services is subject to individual authorisation in case of linear services, while it is subject to notification (general authorisation regime) in case of non-linear services (i.e., on-demand services).

Under reciprocity conditions, authorisations and general authorisations can be held also by operators residing outside the EU/EEA.

Restrictions may, however, apply with regard to operators residing outside the EU/EEA for purposes of national security and defence only.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Italy is a member of the World Trade Organization ("**WTO**") and GATT. It is a member State of the European Union and the EU is a member of WTO in its own right.

Italy has made a commitment under the GATS with no exemptions and has also implemented the principles referred to in the WTO's telecommunications reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Electronic communications are regulated under the ECC.

The operation of electronic communications networks and the provision of electronic communications services to the public are subject to prior notification to MiSE (general authorisation regime).

MiSE also grants individual authorisations for the use of numbers and radio frequency spectrum.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

AGCom is the Italian regulator and watchdog. It ensures the implementation of a universal service and is involved in defining the regulatory framework. AGCom is also dedicated to the protection of intellectual property rights on the Internet. As a watchdog, AGCom is entitled to impose sanctions in case of infringements of the sector-specific regulation and settles disputes arising between operators.

The Competition Authority ("*Autorità Garante della Concorrenza e del Mercato*" – "**AGCM**") is the Italian consumer and competition authority in charge – among others – of sanctioning anti-competitive practices and unfair commercial practice, as well as of controlling merger operations.

AGCom and AGCM cooperate with each other. Both authorities provide opinions to the government, but they are fully independent from the government.

On the other side, MiSE – a government ministry – plays an important role dealing with electronic communications (please see question 1.3).

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Any decision issued by AGCOM and AGCM can be challenged by the interested parties before the administrative court of Lazio Region ("*TAR Lazio*"). The TAR Lazio's rulings can be appealed in the second (and last) instance before the *Consiglio di Stato*.

IDPA's decisions can be challenged by the interested parties before the competent judicial authority, by lodging a complaint in front of the court of the place where the data subject has his/her residence.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The provision of electronic communications services and networks in Italy is subject to a general authorisation/notification to MiSE. In this respect, the company is required to file an *ad hoc* declaration with MiSE, by providing the latter with a series of general information about the company as well as a technical description of the electronic communications networks or services.

Once the declaration is filed, the applicant may immediately start the activities covered by the declaration itself. In case the company does not meet the requirements provided by the law, within 60 days from the notification, MiSE may provide the company with a reasoned resolution stating that the company must stop the activities.

Operators are required to enrol with the Register of Communications Operators ("**ROC**") managed by AGCom.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

The notification to MiSE must include general information about the company (nationality, registered office, VAT number, contact information, details of the authorised representative, etc.) and a technical description of services/networks.

General authorisation is also subject to:

- the payment of the annual fees provided for by the law (Annex 10 of the ECC) and calculated by MiSE;
- the payment of the annual contribution to AGCom, which is calculated as a percentage of the turnover of the operator; and
- a self-declaration which indicates that directors who legally represent the company or the business owner have not been sentenced to more than six months of imprisonment for premeditated crimes and are not subject to security and prevention measures.

In addition, the general authorisation is also subject to compliance with the mandatory obligations provided for by the ECC (such as, for instance, contributing to the financing of the universal service, annually paying the fees calculated by MiSE, ensuring both the interoperability and the networks' interconnection, ensuring the protection of personal data with specific regard to the telecommunications sector and complying with consumer protection legislation, etc.).

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2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

General authorisations have a duration of 20 years and are renewable; they may be extended for a period not exceeding 15 years with the prior presentation of a technical/financial plan from the operator.

According to the ECC, a general authorisation is transferable – even partially – to third parties, provided that a prior communication in this respect is made towards MiSE by clearly pointing out the radio frequencies and numbers assigned. Within 60 days, MiSE may communicate its own denial, based on the transferee's lack of requirements.

As far as individual authorisation is concerned, please see question 3.6, which deals with the transfer of individual rights on the use of radio frequencies.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Yes. Operators may ask for grant of the right to install telecommunications infrastructures on, over or under public or private property. When an operator has the right to install telecommunications infrastructure, AGCom, also by means of specific resolutions, shall impose the sharing of such facilities or property, including entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes and cabinets.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

In order to ensure the provision and interoperability of the services within the European Union, operators authorised for the provision of publicly available electronic communications services and networks have the right and, if expressly requested by other authorised operators, the obligation to negotiate an interconnection agreement for the provision of publicly available electronic communications services.

In this respect, also by means of specific resolutions, AGCom ensures that no restrictions preventing operators to stipulate interconnection and access agreements occur.

AGCom is in charge of any dispute between operators. More in detail, pursuant to AGCom's resolutions No. 226/15/CONS and 449/16/CONS, if a dispute between operators authorised for the provision of publicly available electronic communications services and networks occurs with regard to the mandatory obligation provided for by the ECC, AGCom, at the request of one of the parties, issues a binding decision aimed at resolving the dispute between the operators as soon as possible and, in any case, by four months. AGCom resolution can be appealed before the Regional Administrative Court of Lazio, based in Rome.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Telecom Italia S.p.A., the former incumbent telecom operator also designated as having significant market power ("**SMP**") in certain markets, is required to publish a standard interconnection offer (together with technical and economic factors) in accordance with resolutions issued by AGCom. Some transparency requirements are also provided for other SMP operators.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Retail and wholesale price controls are only imposed on SMP operators, irrespective of the service provided. AGCom conducts analysis of the markets and can provide price and cost regulation to SMP operators for each relevant market, by also establishing the criteria of the prices calculation, through specific resolutions.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

(a) *Telecom Italia S.p.A.* is subject to the accounting separation requirements, since it has been designated as an SMP operator in several markets. The accounting separation obligation is provided for by Article 48 of the ECC and AGCom is in charge of imposing such an obligation on an operator by means of a specific resolution.

(b) Pursuant to Article 50-*bis* of the ECC, AGCom may impose on operators the functional separation, on an exceptional basis, where it assesses that any other available remedies have failed to achieve an effective competition. In 2008 *Telecom Italia S.p.A.* set up a business division of the company – i.e., "Open Access" – with the aim of managing the Telecom Italia fixed access network; subsequently AGCom approved and made binding the separation between corporate functions in charge on one hand for the network management and, on the other hand, for the sale of services.

(c) No operator has been required so far to separate part of their own business into different and autonomous legal entities.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Pursuant to Article 87 of the ECC, operators must obtain authorisation from local authorities for the installation of infrastructure for radio communications equipment, including passive infrastructure.

To facilitate the roll-out of high-speed electronic communications networks, each network operator has the right to offer access to its physical infrastructure elements of high-speed electronic communications networks; at the same time, where an operator expressly requests in writing the installation of elements of a high-speed electronic communications networks, other operators have the duty to allow the requesting operator to access their physical infrastructure.

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Incentives for high-speed broadband are provided for in Article 6 of the Decree-Law No. 133/2014 and in the Investment plan for the development of high-speed broadband adopted in 2016.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

According to the combination of Articles 50 and 45 of ECC, AGCom is in charge of imposing retail price controls on the undertakings that have been designated as having SMP. AGCom shall ensure that any cost recovery mechanism or pricing methodology which must be deemed as mandatory serves to promote efficiency and sustainable competition and to maximise consumer benefits. AGCom has provided, in a series of provisions, the maximum price for termination services supplied by SMP undertakings.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Yes, Italian law provides rules intended to guarantee certain rights to consumers. In this respect, it must be ensured:

- The availability of the universal service: MiSE shall ensure that electronic communications services are made available to all end-users in their territory, regardless of the geographical location on national territory. AGCom shall establish the most efficient approach for ensuring the provision of the above service at an affordable price, in particular respecting the principles of objectivity, transparency, non-discrimination and proportionality.
- The right of consumers to sign a contract which contains contractual terms and conditions, clearly specifying the type of services provided, all the information regarding the operator as well as the way in which these services are provided.
- The right of the consumer to obtain transparent and updated information concerning the prices and the terms and conditions, in respect of access to and use of publicly available telephone services.
- The quality of the service. Specifically, AGCom's resolution requires providers of publicly available electronic communications services to publish adequate and up-to-date information on the quality of their services.
- The right to number portability: subscribers of publicly available telephone services have the right to change operator while keeping their numbers.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Pursuant to the ECC, MiSE is the authority in charge of assigning the national numbering resources as well as of managing the national numbering plan of electronic communications services.

AGCom is, instead, the authority in charge of determining which numbers must refer to specific services. The national numbering plan issued by AGCom resolution No. 8/15/CIR (as recently modified by the resolution No. 17/17/CIR) identifies numbers and codes that may be used by operators for the provision of electronic communications services. The plan is organised by services, and the first digit of each number defines the category of the service provided.

The original assignee of numbers may sub-allocate the same numbers to another duly authorised operator. To this end, the assignee must previously communicate such sub-allocation to MiSE, in order to allow the latter to verify compliance with AGCom's resolution No. 8/15/CIR.

2.17 Are there any special rules which govern the use of telephone numbers?

Yes. Specific rules and requirements are provided for by the national numbering plan as well as by specific AGCom resolution, in particular, with regard to the provision of VoIP services, emergency numbers, toll-free services, shared cost services, premium services and so on.

2.18 Are there any obligations requiring number portability?

Fixed and mobile operators must provide portability to customers. Pursuant to Article 80 of the ECC, AGCom ensures that all users, irrespective of the operator providing the service, are entitled to keep numbers belonging to the national numbering plan and that pricing for portability between operators is cost-oriented. Both mobile and fixed number portability are expressly regulated by specific AGCom resolutions, establishing the terms of the entire portability process, including duration, costs as well as roles and responsibilities within the process.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Pursuant to Article 14 of the ECC, AGCom is the authority regulating the spectrum use and the radio frequencies' assignment, while MiSE allocates radio frequencies based on AGCom's resolutions.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Article 27 of the ECC establishes that, when possible, the use of radio frequency spectrum is not subject to the grant of individual right of use; in such a case, the right to use radio frequencies directly derives from the general authorisation held by the operators.

Since resources are scarce and efficiency in the use of frequencies is required, however, if it is necessary to grant individual spectrum right of use, these are awarded to winners of public comparative or competitive procedures, based on a general obligation of transparency and objective non-discriminatory criteria.

AGCom may impose limitations on the number of rights of use of radio frequencies, in order to grant efficient use of radio frequencies.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

According to the applicable law in Italy, a licence exemption is made only for the use of liberalised frequencies listed in Articles 105 and 99, paragraph 5, of the ECC. For instance, the use of radio LAN (WiFi) frequencies 2.4 and 5 GHz for collective use is not subject to the grant of an individual right of use. Even in the case of a free

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use of the radio frequencies, the other relevant ECC provisions shall continue to be applicable.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Operators holding a general authorisation to install and provide public communications networks and/or provide electronic communications services through the use of radio frequency spectrum are subject to the payment of annual administrative fees, calculated on the basis of the potential target population of the provision service. In addition, operators are required to pay fees for rights of use on frequencies they have been assigned, depending on the bandwidth extension of the frequency band.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Pursuant to Article 2 of the Law Decree No. 21/2012, undertakings must notify the Presidency of the Council of Ministers of any merger or transfer of ownership within 10 days. The Prime Minister, by means of a decree adopted by the Council of Ministers, may exercise the veto power of the Government within 15 days from the notification.

In addition, according to Article 16 of the Law No. 287/1990, mergers shall be notified to the AGCM, only if the concerned undertakings passed certain turnover thresholds.

Change of control implies that information communicated to the ROC-Registry of Communications Operators needs to be updated.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Pursuant to Article 14-*ter* of the ECC, the undertaking can trade on a commercial basis and rent spectrum licences to other operators, holders of the general authorisation or equivalent licence for the provision of network through equivalent technology.

The intention of an operator to transfer the rights of use of the radio frequencies must be notified to both MiSE and AGCom for the relevant approval. MiSE, after hearing AGCom and consulting the Antitrust Authority, communicates, within 90 days, the authorisation of the transfer of rights or the reasons justifying the refusal. The subcontracting company is required to notify MiSE within 60 days from the occurred transfer of the rights.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Cybersecurity is a hot topic in Italy and the Government is focused on it, as proved by the Decree of the President of the Council of Ministers of February 17, 2017, a programmatic document aimed at improving the further development of cyber national architecture. At this stage, however, no specific laws and regulations have been issued on this matter, except for the cyber-security of critical infrastructures.

Nevertheless, several provisions on security measures are provided for by the Data Protection Code.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Pursuant to Article 15 of the Italian Constitution, "*Freedom and confidentiality of correspondence and of every other form of communication is inviolable. Limitations may only be imposed by judicial reasoned decision and in accordance with the guarantees provided for by the law*". In other words, the content of the communications is strictly protected by the Italian Constitution, unless a reasoned decision coming from the Judiciary Authority has been issued as well as in compliance with the guarantees expressly provided for by the applicable law.

It is necessary to make a distinction between data retention and interception.

Data retention

According to the combination of Article 132 of the Data Protection Code and the general resolution issued by the IDPA on "*Secure Retention of Telephone and Internet Traffic Data*" – http://garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1542849 (the "**General Resolution**"), operators providing electronic communications services available to the public on public communication networks are required to keep both telephone and Internet traffic data for justice-related purposes. The public prosecutor may access such data by means of a reasoned decree in compliance with the provisions of the Italian criminal procedure code. As expressly provided for by the Data Protection Code, traffic data does not include the content of communications, which cannot be taken by the operators.

Interception (wire-tap)

Pursuant to Article 96 of the ECC, any company operating a public communications network or providing an electronic communications service is subject to interception obligations. This means that operators are required to allow the competent Judicial Authorities to intercept communications which are originated or serviced in their networks and to acquire information about those. The interceptions include the acquisition of communication content. Please see also question 4.4 below.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Operators must properly fulfil any request for interception or information by competent judicial authorities for any justice-related grounds. Consequently, according to the applicable law in Italy, the justice-cooperation must be deemed as a mandatory obligation to be fulfilled by any operator. Pursuant to Article 96 of the ECC, any company operating a public communications network or providing an electronic communications service is subject to interception obligations – so far, for instance, in such a definition do not fall VoIP calls *tout court*, but only VoIP services interconnecting with the PSTN. The interception requirements cover traditional calls and SMS as well as any other form of communication which can be deemed as an electronic communications service.

In addition, pursuant to the Italian Criminal Procedure Code, emails can also be subject to interception.

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4.4 How does the state intercept communications for a particular individual?

Interception must be ordered by a reasoned decree issued by the Judge or, in case of urgency, by the public prosecutor, in compliance with the provisions set forth by the Italian criminal procedure code. The reasoned decree issued by the public prosecutor must be then validated by the Judge.

According to the applicable law in Italy, the following special rules shall apply with regard to the interception of communications of particular individuals:

- Article 7 of Law No. 219/1989 establishes that the President of the Italian Republic may be subject to interception only for the purpose of investigation concerning offences set out in Article 90 of the Italian Constitution. In such a case, the Constitutional Court shall order the suspension of the President of the Republic from his office to permit the interception of his communications.
- According to the combination of Article 68 of the Italian Constitution and Law No. 140/2003, to intercept the conversations of the Italian Parliament's members, the authorisation of the House to which they belong is required. As far as the interceptions of Ministers' communications, the procedure is the same but, according to the combination between Article 10 and 5 of the Constitutional Law No. 1/1989, if the Ministers subject to investigation are members of different Houses or they are not Members of Parliament, the House which has to issue the authorisation is the Senate.
- According to the combination between Article 271 and 200 of the Italian Criminal Procedure Code, interceptions of conversations or communications of persons subject to professional confidentiality (e.g., priests, lawyers, licensed private investigators and healthcare professionals) may not be used when they concern information protected by professional confidentiality, unless they have been previously disclosed.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Pursuant to the General Resolution, traffic data processed for justice-related purposes must be protected with the help of encryption technology – in particular, against the risk to be acquired and/or accidentally altered in case of maintenance operations performed on IT systems, or else in the course of standard system administration operations. In particular, proper solutions have to be put in place in order to protect the information which is located in the databases used by the IT applications deployed for the processing in question, from being intelligible to any entity that does not have the right to access and/or proper authorisation profiles. To that end, encryption and/or obfuscation of database parts and/or indexes and/or other encryption-based technical measures can be implemented.

Only in case of a reasoned decree issued by the public prosecutor in compliance with the provisions set forth by the Italian criminal procedure code are the operators required to provide this data.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Operators providing electronic communications services available to the public on public communication networks are required to keep:

- telephone traffic data for 24 months; and
- internet traffic data for 12 months (except for the contents of the communications, which cannot be kept pursuant to the applicable law).

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is regulated by the TV Code and specific AGCom Resolutions on the matter. The TV Code applies to all radio and audio-visual media service providers, subject to Italian jurisdiction.

The TV Code provides obligations which apply both to linear and non-linear audio-visual media service providers such as, among others:

a) protection of minors;

b) ban on the broadcasting of content inciting hatred on grounds of race, sex, religion or nationality;

c) advertisement-specific rules; and

d) broadcasting and investment quotas to support EU works.

The public broadcasting service is subject to additional rules.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Linear audio-visual media services distributed over the internet or other platforms are subject to the same rules as linear audio-visual media services broadcast via traditional distribution platforms.

Instead, light regulation applies to non-linear audio-visual media services (i.e., on-demand services).

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The TV Code provides for an individual authorisation system for linear audio-visual media services granted – depending on the platform and in accordance with regulations set forth by the relevant AGCom resolutions – by MiSE (for digital terrestrial television and coaxial cable) or AGCom (for satellite, IPTV, mobile, internet and other platforms).

AGCom is the competent authority for compliance monitoring, regardless of the platform.

Specific rules and obligations are provided depending on the type of licence; however, similar obligations are set forth with reference to:

a) enrolment with the ROC (Register of Communication Operators);

b) keeping a programmes register, to be filled in on a monthly basis; and

c) compliance with rules provided by the TV Code (*e.g.* minors protection, broadcasting and investment quotas, advertising limits, product placement, *etc.*).

A general authorisation regime applies to on demand audio-visual media services; the providers must submit a notification to AGCom.

No authorisation is required for (i) catch-up TV, i.e. non-linear services with catalogues consisting exclusively of programmes previously broadcast in linear mode, to the extent that the broadcaster's linear service has been already authorised, (ii) on-demand services and linear services on other platforms (different from digital terrestrial television, satellite and coaxial cable) whose annual revenues are lower than EUR100,000.

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The public broadcasting service provider is RAI-*Radiotelevisione Italiana S.p.a.,* which has been granted a 10-year concession to broadcast on all platforms by Decree of the President of the Council of Ministers of April 28, 2017.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences can be transferred to third party if the latter meets the requirements provided by the AGCom's resolution governing the licence. The new licensee must communicate the transfer of the licence to the competent authority (*i.e.* AGCom or MiSE depending on the kind of licence), which either authorises the assignment or communicates its own denial, based on the assignee's lack of requirements provided by the law (*e.g.*, if the assignee is based in a country which does not apply reciprocity, *i.e.* where an Italian company could not hold an equivalent licence).

In addition, any change of control of the licensee and any assignment of licence must be notified to AGCom within 15 days. AGCom, before authorising the deal, assesses whether the transfer may lead to the creation of a dominant position which could adversely affect pluralism.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Article 14 of the E-commerce Decree, which has implemented in Italy the E-commerce Directive (Directive 2000/31/EC), sets forth a limited liability regime for mere conduit providers (as well as for other internet service providers) in connection with the transmission of information on a communication network or the provision of access to a communication network provided that the provider: (i) does not initiate the transmission; (ii) does not select the recipient of the transmission; and (iii) does not select or modify the transmitted information.

Moreover, under the E-commerce Decree and in accordance with the E-Commerce Directive, internet service providers are bound neither by an obligation to monitor the information that they transmit or host, nor by a general obligation to actively look for facts or circumstances that indicate presence of illicit activities.

According to a trend of the Italian case law, internet service providers have an actual knowledge of the unlawfulness of the content when they receive a detailed notice (*e.g.*, a cease and desist letter) from an interested third party; in this case: (a) if they are mere conduit providers, they must provide Public Authorities with the data allowing them to identify possible violations of third party's rights; and (b) if they are hosting providers, they must remove the unlawful content (or anyhow make it not accessible).

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

There are no such general obligations for mere conduit providers. For case law, please see question 6.1 above.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The EU Regulation 2015/2120 addressed the issue of net neutrality for the first time, by introducing some high-level rules governing net neutrality. In particular, Article 3 states that providers must treat all traffic equally and irrespective of the sender and recipient, the content accessed or distributed, the applications or services used/provided or the used terminal equipment. Nevertheless, providers may implement reasonable traffic management measures. Noteworthy, on August 2016, the BEREC-Body of European Regulators for Electronic Communications published the Guidelines on the implementation of the net neutrality principle, providing guidance for National Regulatory Authorities in relation to the implementation and the enforcement of net neutrality rules.

Following the introduction of such net neutrality rules and in accordance with the BEREC Guidelines, AGCom carried out monitoring and enforcement activities aimed at ensuring the compliance of Italian providers with the net neutrality rules provided in the EU Regulation 2015/2120. Amongst others, March 2017 AGCom issued the first decision against a provider for non-compliance with Article 3 of the EU Regulation 2015/2120 (in particular, the decision concerned discrimination of zero-rated traffic compared to "normal" traffic).

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

There are no general obligations in this sense under Italian law and no specific rules govern consumer VPN services.

However, with specific reference to online copyright infringements, AGCom issued a regulation "*[...] on the protection of copyright on electronic communications networks*", according to which AGCom may order internet service providers to remove copyright online infringing contents. Mere conduit providers, in particular, may be ordered to block the websites hosted on servers located outside Italian territory.

In addition to the above, Italian law provides for mechanisms to block access to non-authorised gaming websites. In particular, access providers must block non-authorised gaming websites that are inserted in the blacklist kept by the Italian Agency of Customs and Monopolies.

Similar mechanisms are provided in relation to websites hosting child abuse-related contents.

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The firm's practice areas range from litigation to M&A and venture capital, from emerging companies to the exploitation and protection of all forms of intellectual property, from employment to data protection, privacy and cyber-security issues and from technology transactions to antitrust and regulatory issues.

In all these areas, Portolano Cavallo is recognised by multiple legal Italian and international rankings and awards.

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Chapter 16

Japan

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

According to the report of the results of the research issued by the Ministry of Internal Affairs and Communications (*Soumu Shou*) ("MIAC") in March 2017, the businesses relating to telecommunications and information, which include, among others, the telecoms and internet infrastructure sectors, generated approximately ¥14,034 billion of annual sales for FY 2015. The annual sales generated by the broadcasting business, which includes, among others, audio-visual media distribution through broadcasting, were approximately ¥3,458 billion for FY 2015.

There are several prominent operators in the various businesses relating to telecommunications and information, such as the group companies of NTT (Nihon Denshin Denwa K.K.), especially NTT East Corporation ("NTT East"), NTT West Corporation ("NTT West") and NTT Docomo Corporation ("NTT Docomo"), KDDI Corporation and Softbank Corp. In the area of broadcasting, several major companies, such as Nippon Television Network Corporation and Fuji Television Network Inc., provide television programmes through terrestrial-based television broadcasting. Nihon Housou Kyoukai, which is unique in its status as a national public broadcasting entity, is also one of the major providers of television programmes. The principal major players in the areas of satellite-based television broadcasting and cable TV broadcasting are Skyperfect JSAT Corporation and Jupiter Telecommunications Co., Ltd.

Regulatory matters on liberalisation and foreign investments will be discussed under questions 1.2 and 1.4.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

Unlike other countries, Japan has traditionally treated the telecommunications business as two distinct categories from a regulatory point of view: telecommunications (*tsushin*); and broadcasting (*housou*). *Tsushin* is defined as sending, delivering or receiving codes, sounds or pictures by wire, wireless means or any other electromagnetic means, which includes internet. *Housou* is generally defined as sending telecommunications for the purpose of being directly received by the public. The major difference between the regulation of telecommunications (*tsushin*) and broadcasting (*housou*) is that the confidentiality of telecommunications content is protected; thus, the regulation of telecommunications content is avoided as much as possible. In contrast, broadcasting (*housou*) content is regulated in accordance with public welfare.

	Wire	Wireless
Basic Law	Cable Telecommunications Law	Radio Wave Law
Telecommunications	Telecommunication Business Law (the "TBL")	
	Law concerning Nippon Telegraph and Telephone Corporation (Nihon Denshin Denwa K.K.) ("NTT") (the "NTT Law") and others	
Broadcasting	Broadcast Law	

As noted above, the TBL applies only to telecommunications, and the Broadcast Law applies only to broadcasting. The TBL primarily regulates the provision of electronic communications networks or services regarding telecommunications (*tsushin*). The TBL permits competition in Japan, although several other laws restrict foreign ownership.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

MIAC and the relevant subordinated administrative agencies regulate telecoms audio-visual media distribution through the broadcasting and internet sectors. See also question 2.3.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Under the TBL, there are no restrictions on direct or indirect foreign ownership; however, under the NTT Law, direct or indirect foreign ownership of one-third or more of NTT is prohibited. There are general foreign ownership restrictions on holding a radio station licence, although the restrictions on a radio station providing telecommunications services were abolished. Under the Broadcast Law, the following entities or parties are basically not eligible to hold a broadcaster licence: (a) a person whose nationality is not Japanese; (b) a foreign government or its representative; (c) a foreign entity;

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and (d) a company or entity in which any of the aforementioned entities or persons is the executive director, or holds one-fifth or more of the voting rights.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Yes, Japan has been a member of the World Trade Organisation since January 1, 1995. It adopted the WTO Basic Telecommunications Agreement in 1997 and the telecoms reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Telecommunications networks or services are mainly regulated by the TBL. See also questions 1.2 and 2.6.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

MIAC is the governmental body that has the regulatory authority under the TBL and other relevant laws to grant any permission, licence or approval that is required for any telecoms activity. The competition law authority is the Fair Trade Commission ("FTC"), an independent administrative agency with the authority to prevent unfair trade or market dominance. MIAC and FTC jointly issued the "guidelines for the promotion of competition in the telecommunications business field" (originally issued in November 2001, with the latest revision being issued in May 2016), and they collaborate to promote further competition in the telecoms field.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Yes, MIAC decisions may be appealed to Japanese courts pursuant to the Administrative Case Litigation Act. The appellant may seek, for example, the revocation of an MIAC order on the basis that the order has wrongfully affected the appellant's legal interest.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

It is difficult to classify the authorisations into general authorisations and individual authorisations. As for telecommunications services, the TBL generally classifies a telecommunications carrier as either (i) a registration carrier, or (ii) a notification carrier as follows:

A carrier installing cable facilities, such as (i) terminal facilities that are installed in multiple municipalities, or (ii) relay facilities that are installed in multiple prefectures, is required to register with MIAC. Other carriers not operating at such levels are required only to notify MIAC prior to providing telecoms services.

The registration procedure typically takes about 15 days, depending on the services to be provided and the circumstances under which they will be provided. It is desirable also to unofficially consult with MIAC (usually for an additional one to two months) before filing an application for registration. If only notice is required, the prior unofficial consultation with MIAC, if necessary, will take a few days if all the relevant information is provided.

Under the TBL, the fee for registration with MIAC is ¥150,000, but no fee is necessary for notification to MIAC.

The TBL further requires other authorisations, which will be explained in question 2.6, which will also explain authorisation regarding broadcasting.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

(1) Telecommunications (*tsushin*) (see also question 2.5)

(a) Approved carrier (*nintei jigyousha*)

A carrier intending to conduct telecoms business by installing telecommunications circuit facilities, and those who intend to exercise a right-of-way to install transmission lines (such conduct or exercise, collectively, a "public utility privilege"), may, separately from telecoms business entry procedures such as registration or notice, be granted a public utility privilege for all or part of its telecoms business by obtaining MIAC approval.

(b) Universal service carrier

Any telecoms carrier who provides universal telecommunications services ("Universal Services") must establish tariffs and submit these to MIAC prior to implementation of the services (see question 2.16). The TBL defines Universal Services as telecommunications services, the availability of which all over Japan should be secured because they are essential to the lives of the people in Japan. Under a TBL ordinance, services for public calls, home telephone calls, and urgent calls to police or fire stations are included in Universal Services. Universal Services are funded by NTT East and NTT West and other service providers that benefit by connecting to the facilities of these providers.

(c) A carrier installing telecoms facilities

With a few exceptions, any telecoms carrier installing telecoms facilities for use by its telecoms business (certain telecoms facilities as stipulated in Article 41 of the TBL) must submit notices to MIAC regarding its compliance with technical and administration rules and the appointment of a chief telecommunications engineer. See question 2.9 for further information regarding special regulations for a carrier installing Type I or Type II Designated Facilities.

(d) A carrier providing international services

Any telecoms carrier who provides international telecoms services is required to obtain prior authorisation from MIAC before making any arrangements with a foreign government, entity or individual with respect to any telecoms business.

(2) Broadcasting (*housou*)

Regulation of the television broadcasting business primarily consists of (i) the Broadcast Law (*Housou Hou*), and (ii) the Radio Wave Law (*Denpa Hou*).

(a) Broadcast Law

The Broadcast Law sets forth general principles to regulate broadcast content (i.e., TV programmes). For example, broadcasters, including (a) terrestrial-based television broadcasters, (b) satellite-based television broadcasters, and (c) cable TV broadcasters, must not harm public peace

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and must take a neutral political position (Article 4). A broadcaster is required to draw up standards for its television programmes and produce programmes that satisfy such standards (Article 5). Under the Broadcast Law, any person or entity planning to be a terrestrial-based television broadcaster or a satellite-based television broadcaster (*kikan-housou-jigyousha*) is generally required to obtain an authorisation from MIAC. Further, any person or entity planning to be other types of broadcasters, including a cable TV broadcaster (*ippan-housou-jigyousha*), is required to be registered with MIAC.

(b) Radio Wave Law

The Radio Wave Law regulates the use of radio waves and thus may apply to both telecommunications and broadcasting using radio waves. Under the Radio Wave Law, any person or entity planning to establish a radio station is required to obtain a licence from MIAC, except for cases involving certain specialised radio stations.

In order to obtain a radio station licence, an applicant must submit to MIAC a standard application form containing information such as (i) the purpose of the radio station, (ii) its facilities' locations, and (iii) the type and frequency of radio waves to be used. If the radio station plans to provide broadcasting services, certain other information, such as a business plan, items for broadcasting and the area for broadcasting, must also be provided.

MIAC's review of the application will include consideration of the existence of an adequate financial basis to operate the planned business and conformity with standards provided in the relevant MIAC ministerial ordinance. Note that MIAC will allocate available radio frequency (see "Frequency Plan" described in question 3.2); thus, approval of a radio station licence will be subject to such planning, and in the case of the radio station providing broadcasting services, broadcast content and broadcast area requirements.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

In general, licences may not be transferred or traded, but exceptions exist depending on the type of licence. A telecoms carrier's registration, for example, may be transferred to a third party if its entire telecoms business is transferred (including by merger (*gappei)* or corporate split *(kaisha bunkatsu)*, in which that third party succeeds to the entire telecoms business).

On May 22, 2015, the TBL was revised (the "Revised TBL"), and the revisions took effect on May 21, 2016. Under the Revised TBL, if a telecoms carrier installing Type I or Type II Designated Facilities plans a merger, a corporate split or a business transfer, it must apply for a renewal of its registration, with certain exceptions.

The duration of a licence depends upon its type or kind. In the case of notice and registration for a telecoms carrier, there is no stated licence duration. In the case of a radio station licence, the duration is five years, with certain exceptions.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Yes, as stated in question 2.6, with MIAC approval, an approved carrier (*nintei jigyousha*) may have certain rights to use land under the TBL.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Generally, a telecoms carrier installing telecoms facilities must interconnect its facilities with other telecoms carriers if so requested by other carriers and there is no justifiable reason under the TBL to reject the request. A carrier providing Universal Services is required to submit for MIAC's approval, the terms and conditions (including tariffs) of its services, and it must provide telecoms services in accordance with such terms and conditions (see question 2.14).

As NTT group companies (please see question 1.1) have large-scale facilities (e.g., cables direct to users' homes), such facilities could potentially prevent other carriers from providing services. Under the TBL, the NTT group companies' facilities are categorised as Type I or Type II designated facilities ("Designated Facilities"). Like other telecoms carriers holding Designated Facilities, NTT group companies are required to submit to MIAC, and generally as in the case of a carrier installing Type I Designated Facilities, they must also obtain MIAC's approval regarding the terms and conditions (including tariffs) of interconnection with other carriers, interconnect their telecoms facilities in accordance with such terms and conditions, and provide services to other carriers equally (see question 2.14).

The chart below describes how disputes are resolved.

	Mediation	Reconciliation	Consultation Order	Award
Object	1. Interconnection of telecoms facilities 2. Shared use of telecoms facilities 3. Provision of wholesale telecoms services 4. Installation/maintenance of telecoms facilities for interconnection 5. Utilisation of land and works for interconnection 6. Provision of information for interconnection 7. Entrustment of work 8. Utilisation of facilities for provision of services 9. Operation of facilities for provision of services 10. Utilisation or operation of radio wave facilities operated by non-licensed party		1. Interconnection of telecoms facilities 2. Shared use of telecoms facilities 3. Provision of wholesale telecoms services	
Acting Party	Either consult-ation party	Both consultation parties	Either consultation party	
Neutral Party	TBDSC Mediator	TBDSC Arbitrators (3)	Minister (referring to TBDSC for deliberation)	
Major Procedures	1. Interview 2. Mediation offer	1. Reply 2. Hearing 3. Facts investigation 4. Settlement offer 5. Judicial decision	1. Hearing 2. Order	1. Reply 2. Award

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	Mediation	Reconciliation	Consultation Order	Award
Options to Challenge Procedural Result	Refusal to accept proposed mediation	None	1. Lodging opposition (only for a party who was notified by a notice posted on the notice board of a hearing and did not appear) 2. Lawsuit to seek revocation (w/n six mos.)	1. Civil action to increase or decrease monetary award (w/n six mos.) 2. Lodging opposition (except for the above) 3. Lawsuit to seek revocation (w/n six mos.)

(Source: MIAC, *Fair Settlement of Disputes in the IT Era* (8th ed., Nov. 2008), Ch. 1.)

(a) MIAC Order

MIAC may, under certain circumstances stipulated by the TBL, order a telecoms carrier installing telecoms facilities to start or reopen negotiations (if suspended) with another carrier regarding an agreement to interconnect the former's telecoms facilities if the former refuses to enter into such an agreement.

(b) MIAC Award

In the event carriers negotiating the interconnection of telecoms facilities fail to agree on such items as monetary payments, a carrier (or carriers) may apply to MIAC for an award (*saitei*) under the TBL. Likewise, if an MIAC order has already been issued, the relevant carrier (or carriers) may apply to MIAC for an award. If MIAC grants an award, the parties are deemed to have come to an agreement. Any carrier dissatisfied with the financial conditions of an award may seek an increase or decrease by filing a lawsuit within six months of the day on which that carrier is notified of the award result.

(c) Mediation (*assen*) and Reconciliation (*chusai*) by Commission

A carrier may choose to apply to the MIAC-run Telecommunications Business Dispute Settlement Commission (the "TBDSC") for mediation or reconciliation in the above cases, but a carrier may not proceed with both an MIAC award and a mediation or reconciliation at the same time.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Operators providing Universal Services and services provided by Type I Designated Facilities are required to publicly disclose tariffs which set forth fees and other terms and conditions, and post them at their offices. Further, operators providing services using Type I Designated Facilities and Type II Designated Facilities are required to publicly disclose the tariffs which set forth interconnection charges.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Charges for interconnection are generally determined by the carrier which provides the connection, with some exceptions such as follows:

(a) As stated in question 2.9, charges for Universal Services and interconnection for a carrier installing Type I Designated Facilities are generally subject to MIAC approval.

(b) Interconnection charges for a carrier installing Type II Designated Facilities require notice to MIAC.

(c) MIAC may, under certain circumstances under the TBL, change the charges under items (a) and (b) above (see question 2.14).

Charges for wholesale lease lines are not subject to price or cost regulation, and providers may decide prices at their own discretion. If providers cannot reach an agreement in order to provide services by using wholesale lease lines, pursuant to the TBL, MIAC may grant an award.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Under the TBL, the separation of accounting, functional and legal duties is not explicitly required, but the following requirements do exist:

- Telecoms carriers providing Universal Services and certain other services, and installing Type I Designated Facilities and Type II Designated Facilities, are required to organise their accounting pursuant to the relevant law (Article 24 of the TBL).
- Telecoms carriers installing Type I and Type II Designated Facilities are required to disclose their accounting documents (e.g., balance sheets and profit and loss statements) to the public (Article 30-6 of the TBL).
- Telecoms carriers installing Type I and Type II Designated Facilities may not, among other things, (i) use any information that they obtain from an interconnection with other telecoms carriers for purposes other than interconnection, and (ii) prioritise certain telecoms carriers without good reason (Articles 30-3 and 30-4 of the TBL).
- Officers and directors of a telecom carrier installing Type I Designated Facilities may not serve as officers or directors of its affiliates (Article 31-1 of the TBL).

In addition, NTT East and NTT West may not operate telecoms businesses across certain prefectural boundaries, such as long-distance telecoms business, pursuant to the NTT Law. Further, consolidation between telecoms carriers is regulated under the Anti-monopoly Law.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Generally, a telecoms carrier installing telecoms facilities must interconnect its facilities with other telecoms carriers if so requested

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by other carriers and there is no justifiable reason under the TBL to reject the request. If the copper/fibre networks or other infrastructure are Designated Facilities, a telecom carrier holding Designated Facilities is required to submit to MIAC, and generally as in the case of a carrier installing Type I Designated Facilities, it must also obtain MIAC's approval regarding the terms and conditions (including tariffs) of interconnection with other carriers, interconnect their telecoms facilities in accordance with such terms and conditions, and provide services to other carriers equally (see question 2.9).

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Providers of telecoms businesses, including fixed and mobile services that are either registered with, or have submitted notification to, MIAC under the TBL are not required to submit a tariff or price chart unless they provide Universal Services (see question 2.6) or have Designated Facilities (see question 2.9). Such providers may decide the prices for their services at their own discretion. However, MIAC has the authority to order providers to correct or improve their business if, among other things, fees or charges are not calculated fairly and clearly or services are provided in an inappropriate manner, in either case, to the extent that they impede consumers' benefits.

Providers of Universal Services or those having Designated Facilities are required to submit their tariffs to MIAC and to provide their services in accordance with such tariffs. MIAC has the authority to order providers to correct or amend the tariffs if, among other things, the tariffs fail to set forth a method for calculating fees or charges fairly and clearly.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

As described above, the TBL regulates the provision of electronic communications services. The TBL's principal aim is to secure consumer benefit by ensuring fair provision of services, especially with respect to fundamental public services. In this regard, the TBL requires providers to: (i) give prior notice to consumers if services are to be suspended or discontinued; (ii) explain their terms and conditions to consumers; and (iii) process complaints and inquiries from consumers properly and promptly. Further, under the Revised TBL, in order to protect consumer interest, providers are required to deliver written material to consumers who enter into agreements with those providers regarding the services designated by MIAC. In addition, MIAC has published guidelines for the protection of consumers. As for Universal Services, please see questions 2.6 and 2.14.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers, including mobile telephone numbers, and the network identifying codes are allocated by MIAC, following a successful application by the relevant telecoms business provider. Telecoms business providers are required to file an application identifying the necessity for telephone numbers and other items.

2.17 Are there any special rules which govern the use of telephone numbers?

MIAC must maintain a Telecoms Numbering Plan (the "Numbering Plan") in accordance with the TBL and the regulation regarding the telecoms number (the "Number Regulation"). A telecoms business provider is required to use the numbers only for the provision of telecoms business, treat users equally, and identify the type or content of telecoms services by the number under the Number Regulation. If a telecoms business provider fails to comply with the Number Regulation, MIAC may invalidate the allocation of numbers. In addition, if MIAC changes the Numbering Plan, MIAC may change the allocated numbers.

2.18 Are there any obligations requiring number portability?

Number portability for mobile telephones started in 2006, with the issuance of the Rule for Numbers for Telecommunications, which sets forth the obligation requiring number portability.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The Radio Wave Law gives MIAC the authority to allocate frequency spectrum to private telecommunications operators for the establishment of radio transmission stations. Unlike other jurisdictions, which allot frequency spectrums through an auction system, the use of radio frequency spectrum in Japan is allocated at the discretion of MIAC after consultation with the Radio Regulatory Council and consideration of the plans submitted by the operators. In March 2011, the MIAC established a "Panel regarding Spectrum Auction" to consider the implementation of a spectrum auction system. In December 2011, this panel released a report supporting an auction system for 4G mobile telecommunications. Following the publication of this report, a bill to amend the Radio Wave Law to introduce an auction system was submitted to the Diet in 2011. However, due to the shift of political power in Japan in 2012, the Diet was dissolved while deliberations on the bill were ongoing. The bill was not passed and has not been discussed by the Diet since 2012. In January 2013, MIAC announced that it does not have any immediate plans to request the Diet to amend the Radio Wave Law to implement an auction system.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

MIAC generally implements the Frequency Plan by considering the business plans submitted by telecoms carriers.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Yes. Certain types of radio stations that discharge weak radio waves (as designated by the enforcement rule of the Radio Wave Law), such as phone handsets for home use and wireless card systems, are exempt from licensing under the Radio Wave Law.

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3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Fees for applications for a licence to establish radio stations under the Radio Wave Law vary from less than ¥10,000 to around ¥150,000, depending on the power of the radio station emission. There is a registration fee of ¥30,000 per station generally, but the registration fee for a broadcasting station is ¥150,000. Further, annual fees for usage of frequency spectrum vary from less than ¥1,000 to over ¥100,000,000, depending on the type of radio station (such as mobiles, satellites or others), the power of the radio station emission and the area of the radio station.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Any person who intends to establish radio transmission stations to be used for allocated spectrum must first obtain a licence from MIAC. In case of a licence for radio transmission stations providing telecommunications services, a change of control of the licensee is not a cause to rescind the licence or to require a notification to MIAC.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Under the Radio Wave Law, a spectrum licence generally may not be assigned, traded or sub-licensed; however, it may be assigned in conjunction with an inheritance, a merger (*gappei),* a corporate split (*kaisha bunkatsu*), or a business transfer upon MIAC approval.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

One of the basic principles, if not the most important principle, of the TBL is the secrecy of communications. The secrecy of communications protects not only the contents of communications but also any information that would enable someone to infer the meaning or the contents of communications. In this regard, access log and IP address data are protected under the secrecy of communications. The TBL does not explicitly provide how a telecoms carrier may deal with cyber-attacks without breaching the secrecy of communications. However, in line with the significant increase in malware and other forms of cyberattack, MIAC issued the "First Report from the Study Group on Properly Dealing with Telecommunications Business Cyber-attacks" in April 2014 and the "Second Report from Study Group for Properly Dealing with Telecommunications Business Cyber-attacks" in September 2015. Both reports address whether a telecoms carrier may deal with cyber-attacks and the issues that may arise in connection with the secrecy of communications. The findings of both reports are included in the guidelines dealing with cyber-attacks and the secrecy of communications issued by the Council for the Stable Use of the Internet, a council composed of five associations, including the Japan Internet Providers Association ("JAIPA").

Further, MIAC established, with internet service providers, cable TV service providers, software security service vendors, and other companies, the Advanced Cyber Threats response InitiatiVE ("ACTIVE") to assist internet users with preventing malware infection and to enhance cybersecurity.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

As the secrecy of telecommunications is protected under the TBL, access to private communications is generally prohibited. The MIAC guidelines regarding the protection of personal information (the latest revision was issued in April 2017) in telecoms businesses state that telecoms carriers may not provide personal information to third parties without the prior consent of the owner of the personal information. However, telecoms carriers may provide the requested information without the required consent if, among others, national or municipal governments or authorities need the information for the due performance of their duties pursuant to applicable laws, and prior consent will harm that due performance.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Telecoms carriers are not required to maintain call interception (wire-tap) capabilities.

4.4 How does the state intercept communications for a particular individual?

If the authorities seek call interception, they are required to follow the procedures set forth in the Criminal Procedure Law and other relevant laws. Qualified prosecutors and policemen may have access to information pursuant to a court-issued warrant, which should specify, among other things, the suspect's name, a summary of the suspected crime, which call to intercept, how and where an interception is planned, the planned period for carrying out the interception, and other conditions for interception. The interception is permitted only regarding certain significant crimes, and the period of the interception term may not exceed 10 days, unless a court extends the term, but only up to 30 days.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The "Standard for Security and Reliability of the Information Network" issued by MIAC sets forth certain rules to maintain the secured network, which include the obligation to use encryption for confidential telecommunications. Telecoms carriers are generally not required to provide encryption keys to the state.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

As the confidentiality of telecommunications is protected under the TBL, retention of telecommunications data is generally prohibited. The MIAC guidelines regarding the protection of personal information in telecoms businesses state that telecoms carriers are allowed to obtain certain limited personal information only where such information is necessary to provide the services; however, the retaining or recording of telecommunications content is not allowed. Recording of the date and time of telecommunications, which does not include recording of the content, is allowed to the

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extent that it is necessary for telecoms carriers' operations such as billing. According to the guidelines, a telecoms carrier may, but is not required to, retain such information for a period necessary for the purpose, such as billing, and must delete such information after such period.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Audio-visual content is distributed through (a) terrestrial-based television broadcasting, (b) satellite-based television broadcasting, (c) Cable TV broadcasting, (d) game software, (e) movie content, (f) video content, and (g) internet content (original video-based net content).

Audio-visual content is protected under the Copyright Law. In this regard, in order to manage the copyrights of audio-visual content appropriately, the Audiovisual Rights Management Association was established in June 2011.

The distribution by way of broadcasting of audio-visual media, such as (a) terrestrial-based television broadcasting, (b) satellite-based television broadcasting, and (c) cable TV broadcasting, is mainly regulated by the Broadcast Law. See also questions 1.2 and 2.6.

The distribution by way of internet is mainly regulated by the TBL.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Terrestrial-based television broadcasting businesses which provide traditional distribution platforms are regulated mainly by the Broadcast Law.

The Broadcast Law requires terrestrial television broadcasters to establish and publicly disclose standards for television programmes. It does not, however, require the inclusion of specific matters in those standards. The Japan Commercial Broadcasters Association (*Nihon Minkan Housou Renmei*) has a template for those standards, which commercial broadcasting companies usually incorporate or refer to in their own standards. Those standards provide for restrictions on advertising, including requirements for broadcasters to make it clear that advertising is for commercial purposes, to ensure viewers do not feel uncomfortable on account of the broadcasting time of the advertisement, and to ensure that the volume of advertising per week is 18% or less of the total broadcasting hours. Note that the Broadcast Law prohibits Nihon Housou Kyoukai, as a national public broadcasting entity, from broadcasting advertisements for commercial purposes on behalf of third parties.

Further, those standards provide for the general principles in making television programmes. For example, broadcasters should respect legal requirements and human rights, be careful about the content (e.g., violence or unlawful behaviours) of programmes prepared for children and young people, and consider broadcasting times of programmes, bearing in mind that children and young people may be watching during those times.

In contrast, providers of content delivered over the internet without any hardware such as a set-top box (e.g., over-the-top service providers) are generally not regulated by the Broadcast Law and the TBL.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

See question 2.6.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Under the TBL, the status of a registration carrier or notification carrier is not assignable; except in conjunction with an inheritance, a merger (*gappei*), or a corporate split (*kaisha bunkatsu*) in which all of the telecoms business is transferred to another entity. See also questions 2.7 and 3.6.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Internet service providers ("ISPs") may have immunity against certain liabilities unless certain conditions set forth under the relevant law are met. An ISP may not enjoy immunity for infringement upon a third party's information if: (i) the ISP was technically able to prevent the dispatch of that information, and the ISP knew or should reasonably have known of the infringement; or (ii) the ISP itself dispatched the information.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

A party whose right is infringed by information on the internet may ask ISPs to disclose the name, address and other information of the infringing party if (i) the infringement is apparent, and (ii) pursuant to relevant law, the infringed party has a good reason for such disclosure. Further, JAIPA issued guidelines regarding requests for the deletion of information with respect to infringement. If ISPs do not respond to such requests, they may lose their immunity (see question 6.1).

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

MIAC released a report regarding network neutrality in September 2007 (the "Net Neutrality Report"). The Net Neutrality Report identified two issues as critical to network neutrality – fair allocation of network development costs and fair access to the network by telecommunications operators, including content providers – and, given the need to enable the network to absorb rapid increases in traffic, discussed who should bear the costs of such development and whether telecommunications operators may engage in packet-shaping (or traffic-blocking) to ensure the network's service quality.

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In particular, MIAC discussed whether heavy users should be required to pay additional charges based on their packet usage, and whether distributors of rich content should be required to pay ISPs for additional charges. Currently, there is no specific law prohibiting the requirement of such payment, and the Net Neutrality Report essentially concluded that these matters should be left to the market.

As for packet-shaping, four associations comprising telecommunications operators issued a guideline for this in May 2008 pursuant to the discussion in the Net Neutrality Report. The guideline provides that packet-shaping may violate the TBL, because it violates the confidentiality of telecommunications content which is protected under the TBL, but it may be permitted in an exceptional situation, such as general users experiencing difficulty accessing a network due to heavy users' traffic or if a specific application is excessively occupying the network. The guideline also states that telecommunications operators should let users know, in the tariffs, of the possibility of packet-shaping and how and when it would occur.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Under the Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People, telecommunications operators who are engaged in a business relating to providing internet services to teenagers are required to adopt measures to limit the exposure of teenagers to harmful information – for example, information inducing them to commit a crime, information that stimulates sexual drive or information containing atrocious descriptions such as murder. No specific law regulates VPN services.

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Korea

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SEUM Law

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

According to the Korea Association for ICT Promotion (see industry report dated July 2016), the 2015 estimated revenue for the telecommunications industry was KRW 58.28 trillion (USD 50.96 billion). As of December 31, 2015, three service providers (SK Telecom, KT and LG U+) dominated the Korean market with a combined market share of approximately 90% in telecommunications and internet services based on revenue.

The broadcasting industry generated KRW 15.32 trillion (USD 13.39 billion) in revenue in 2015 according to a report jointly issued by the Ministry of Science and ICT ("**MSIT**") and the Korea Communications Commission ("**KCC**"). The audio-visual media distribution sector remains dominated by the following traditional broadcasting companies: Korean Broadcasting System ("**KBS**"), Munhwa Broadcasting Corporation ("**MBC**") and Seoul Broadcasting System ("**SBS**").

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The telecommunications and internet businesses are primarily regulated by the following:

- the Telecommunication Business Act ("**TBA**");
- the Act on Promotion of Information and Communications Network Utilization and Information Protection ("**ICNA**"); and
- the Radio Waves Act ("**RWA**").

The distribution of audio-visual media, or broadcasting, is regulated by:

- the Broadcasting Act; and
- the Internet Multimedia Broadcast Services Act.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The two major government bodies that regulate telecommunications and broadcasting in Korea are the MSIT and the KCC.

The KCC is a regulatory agency directly under the authority of the President while the MSIT is an executive ministry under the authority of the Prime Minister. The TBA and the Broadcasting Act authorise both the KCC and MSIT to regulate telecommunications and broadcasting by granting the two agencies the authority to develop policies, grant authorisations, investigate violations and levy sanctions.

The TBA and the Broadcasting Act specify which agency has authority over certain matters. Generally, the MSIT has a wider range of responsibility with respect to telecoms businesses while the KCC is focused on broadcasting. In particular, the TBA authorises the MSIT to grant licences and registrations for telecoms businesses and establish policies regulating such businesses while granting the KCC with authority to decide on competition matters related to telecommunications. On the other hand, the Broadcasting Act authorises the KCC to issue licences for terrestrial broadcasting and regulate content while authorising the MSIT to issue licences for satellite and CATV broadcasting under the Broadcasting Act.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The telecoms and broadcasting industries have been liberalised and are open to foreign investment subject to certain restrictions. In terms of foreign investment specifically, the main restrictions are as follows:

	Type of Business	Authorisation Type	Relevant Agency	Foreign Ownership Restriction
TBA	Common telecommunication	Licence	MSIT	Maximum 49% ownership
	Special-category telecommunications	Registration	MSIT	None
	Value-added telecommunications	Report	MSIT	None

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	Type of Business	Authorisation Type	Relevant Agency	Foreign Ownership Restriction
Broad-casting Act	Terrestrial broadcasting	Licence	KCC	Foreign ownership is prohibited
	CATV	Licence	MSIT	Maximum 49% ownership
	Satellite	Licence	MSIT	Maximum 49% ownership
	General programming	Registration	KCC	Maximum 20% ownership
	News programming	Licence	KCC	Maximum 10% ownership

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Yes, Korea has been a member of the World Trade Organisation since January 1995. Korea has made commitments under the GATS for special-category services and value-added services and has implemented the telecoms reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Telecoms networks and services are mainly regulated by the TBA and ICNA (see question 1.2). The TBA and its related regulations comprise the main laws that regulate telecoms networks and services. The TBA provides the requirements and procedures for obtaining the relevant licences, ownership and operations requirements, and rules related to fair competition and use of land.

The ICNA sets forth specific requirements applicable to network and service providers that are intended to protect consumer rights such as protection of personal information and minors.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The KCC and the MSIT are the main authorities regulating the telecoms industry (see question 1.3). The MSIT's role under the TBA is to develop policy and oversee licensing while the KCC plays a larger role on the consumer protection side including competition.

The MSIT is a ministry of the government so it is not independent. The KCC is technically independent from the government, but the commissioners and chairman are appointed by the President and a committee of the National Assembly so its independent nature is arguably subject to influence from the government.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Yes. A KCC decision may be appealed to an appeals committee within the KCC, and a decision from such appeals committee can be further appealed to the courts.

An MSIT decision may be appealed to the Central Administrative Appeals Commission, a separate government agency that handles administrative appeals, and a decision from the Central Administrative Appeals Commission can be further appealed to the courts.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The TBA identifies three types of communications businesses: common telecommunications; special-category telecommunications; and value-added telecommunications businesses. Each type of business requires a different type of authorisation from the MSIT as shown in the table below. There is no distinction between general and individual authorisations.

Business Type	Business Description	Authorisation Type
Common telecommunications	Provision of services for transmitting or receiving sound, data, and images such as telephone or internet services; or leasing equipment and facilities for the transmission or receipt of sound, data and images	Licence
Special-category telecommunications	Provision of common telecommunications services through the use of telecoms networks owned by a person that has a common telecommunications business licence	Registration
Value-added telecommunications	Provision of non-core services using telecoms network	Report

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2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Below is a summary of the main requirements under the TBA:

Business Type	Review Criteria	Certain Key Service Requirements
Common telecommunications	The MSIT has wide discretion in deciding whether to issue a common telecommunications business licence. The key document that will be evaluated by the MSIT is the applicant's business plan. The MSIT will consider the following factors in reviewing the business plan: ■ Financial capability. ■ Technical capability. ■ Sufficiency of measures to ensure user protection. ■ Sufficiency of plans for investment in upgrades.	■ Filing of report to MSIT regarding service charges and terms of use. ■ Provision of contract terms to users. ■ Sufficient verification of user identity for mobile communications.
Special-category telecommunications	Any person seeking to operate a special-category telecommunications business must register with the MSIT and submit the following: ■ Operation plan. ■ Details of principal facilities to be used in business. ■ Terms of use applicable to users. The company must meet certain minimum capital requirements ranging from KRW 300 million to KRW 3 billion depending on the type of business. The MSIT may impose conditions on the registration if it deems necessary to ensure fair competition, protect users and improve service quality.	■ Commencement of business within one year of registration. ■ Implementation of user protection measures. ■ Retention of certain qualified employees such as a licensed radio electronic communication engineer.
Value-added telecommunications	Any person seeking to operate a value-added telecommunications business must file a report with the MSIT including: ■ A schematic diagram of the telecoms networks to be used. ■ Detailed statement of user protection measures. The report must also show that the company implements technical measures to prevent online copyright infringement. Those providing services via the Internet with less than KRW 100 million in capital are exempt from filing a report.	The following are some key requirements that apply to value-added telecoms businesses: ■ Commencement of business within one year of registration. ■ Implementation of technical measures to protect minors. ■ Implementation of technical measures to protect against computer viruses and malicious code.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The transfer and change of control restrictions for the three types of telecoms business are as follows:

Business Type	Duration, Transfer, Change of Control Restrictions
Common telecommunications	MSIT approval is required for the following: ■ Sale or acquisition of a common telecoms business. ■ Merger with a common telecoms business. ■ Acquisition of 15% or more shares, become the largest shareholder or otherwise gain effective control, of a licensed business. Approvals cannot be transferred. Approvals remain in effect indefinitely.
Special-category telecommunications Value-added telecommunications	A report must be filed with the MSIT for the following: ■ Any change in information that was previously registered or filed in a report. ■ Sale or acquisition of a business registered with the MSIT or that previously filed a report with the MSIT. ■ To effect a merger with business registered with the MSIT or that previously filed a report with the MSIT. Reports cannot be transferred. Filed reports remain in effect indefinitely and information may be amended or updated.

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Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The TBA includes specific provisions dealing with the following issues:

- Prior consultation with owners of private property to install infrastructure and petition for government permission in case of disagreement.
- Temporary use of land for up to six months for measurement and inspection.
- Request for removal of obstacles.
- Reinstatement and compensation for losses caused by use.
- Use of public property for installation.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The MSIT has authority to mandate wholesale interconnection and access on the operator with the largest market share after considering market size, number of users and conditions of competition. Wholesale services may also be privately agreed to between parties. The KCC has authority to resolve disputes and the parties may also file suit with the courts.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The telecoms operator that has been designated by the MSIT to provide wholesale services for having the largest market share must publish contract terms and prices. Currently, the operator with the largest market share is KT. For private agreements, the MSIT will determine and publish guidelines for contract terms and prices.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Please refer to questions 2.9 and 2.10.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Yes. Common telecoms operators must separate the accounting for telecoms business from non-telecoms business. They must also separate accounting between common telecommunications services and value-added telecommunications services as well as the accounting for assets, expenses and profits by type of telecoms and functions.

After consulting with the MSIT, the KCC may order functional separation or legal separation, if the KCC determines that the operator engaged in activity that undermines or may undermine fair competition or user rights.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Aside from the TBA, the Framework Act on National Informatization ("**FANI**") was enacted to promote sharing of information through high-speed broadband networks. The FANI authorises the MSIT to designate government agencies to support the development and use of broadband integrated service digital networks, including expansion and management of passive infrastructure and other facilities. Under the FANI, telecoms businesses may also request the construction or lease of facilities from the government.

There are no terms or requirements related to making available passive infrastructure, copper networks, cable TV and/or fibre networks.

There are no statutory or government provided incentives or regulatory holidays related to high-speed broadband networks.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

No, retail price controls are not imposed on operators.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

All telecoms business operators must provide basic telecoms services (wire telephone services, telephone services for emergency communications) at reasonable fees (including the reduction of charges for disabled and low-income individuals) and cannot refuse service without justifiable grounds.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The MSIT allocates network identification codes, telephone numbers and mobile phone numbers based on applications for the code or numbers submitted by operators.

2.17 Are there any special rules which govern the use of telephone numbers?

The use of telephone numbers is regulated by the Regulation for the Management of Telecommunications Numbers issued by the MSIT. The Regulation covers fundamental and standard issues and does not contain any special rules.

2.18 Are there any obligations requiring number portability?

Yes. Pursuant to the TBA, the MSIT has issued regulations that require operators to provide number portability.

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3 Radio Spectrum

3.1 What authority regulates spectrum use?

The RWA grants the MSIT with authority to regulate spectrum use. However, the KCC has the authority to regulate radio frequencies used by a terrestrial broadcasting business.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The use of radio spectrum is authorised by the MSIT and allocated to candidates through auctions and 'beauty parades' pursuant to the RWA as follows:

Auction

The MSIT will issue a public notice of its intent to assign radio frequencies and then select a bidder through an auction process. The MSIT can set a minimum price for the auction and may require a security deposit.

Beauty Parade

If the MSIT does not assign radio frequencies through an auction, it may assign radio frequencies through a beauty parade taking into consideration the efficiency of the use spectrum resources, the financial and technical capability of the applicant, and the characteristics of the relevant radio frequencies. The MSIT may also allocate radio frequencies through a beauty parade if deemed necessary for security or diplomatic reasons.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Yes. A licence is not required for the use of spectrum in certain cases. Any person can establish a radio station by merely filing a report with the MSIT if the radio station:

- has weak radio waves or it does not need installation and maintenance of radio facilities;
- is used exclusively for reception;
- is established by a person who has been allocated radio frequencies to provide telecommunication services under the RWA; or
- is established for digital multimedia broadcasting under the Broadcasting Act.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

There are two types of fees payable for the use of radio frequencies: (i) allocation fees; and (ii) spectrum use fees.

Allocation Fee

If the MSIT has allocated a frequency spectrum through an auction, the allocation fee will be the amount offered by the bidder. 25% of the fee must be paid in a lump-sum with the remaining 75% paid in instalments over the usage period.

In the case of a beauty parade, the fee will be a combination of an amount calculated based on the expected revenue and an amount calculated based on actual revenue. For the portion that is calculated based on expected revenue, 50% of this amount must be paid in a lump-sum with the rest paid in instalments over a three-year period starting from the third year of the allocation. The amount of the fee based on actual revenue must be paid every year of the usage period.

Spectrum Use Fee

In addition to the allocation fee, the MSIT or the KCC may charge a fee for the use of radio frequencies by a radio station. The fee is calculated based on the frequency band, range of radio waves and antenna supply power, except for mobile carriers. The fee for mobile carriers is calculated based on the number of subscribers.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

No approval or filing of a report is required in connection with a change of control of a licence holder.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Spectrum licences may be transferred or sub-licensed three years after issuance with approval from the MSIT. The transferee or lessee must satisfy all the requirements applicable to the original licence holder.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Cybersecurity matters related to key infrastructure are regulated by the Act on the Protection of Information and Communications Infrastructure (the "**APICI**"). The objective of the APICI is to formulate and implement provisions to protect major information and communications infrastructure such as electronic systems utilised for national security, national defence, finance, telecommunications, transportation and energy.

Public sector cyber-security matters are regulated by the following:

- National Cyber Security Management Regulation ("**NCSMR**") – Pursuant to the NCSMR, the government and public institutions are required to establish cyber safety measures and conduct relevant training related to matters such as malware contained in emails and other forms of system attacks.
- Electronic Government Act – This act regulates the computerisation of administrative affairs and requires government institutions to implement security measures (e.g., encrypting important documents, use of security programmes or hardware to prevent hacking or access to information) to ensure safety and reliability of information systems.

Private sector cyber-security matters are regulated by the following:

- ICNA – This act protects users, users' rights, minors and personal information contained in information and telecommunications networks. This act requires that telecommunications service providers implement a management system (e.g., require use of passwords, security software and firewalls, track employees that access personal information) for information security. In addition, the act contains penalty provisions for the infringement of information and telecommunications networks, including imprisonment and fines.
- The Electronic Financial Transactions Act – This act regulates electronic financial transactions and sets forth obligations of electronic financial service providers. The act requires that (i) users comply with certain standards related to the

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transmission of electronic financial transaction information and the use of electronic certificates, and (ii) electronic financial service providers implement safety measures for electronic financial transaction infrastructure. Infringement of electronic financial transaction infrastructure under this act is more severely punished than infringement under the ICNA.

The government has discussed allocating certain authority to the National Intelligence Service in connection with cyber-terror prevention in the public and private sectors, but no actions have been taken at this time.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Protection of Communications Secrets Act ("**Secrets Act**") generally protects secrecy and freedom of communication by making due process of law mandatory for the government to access communications. Evidence obtained in violation of the law may not be admitted as evidence in a court proceeding.

The Secrets Act specifies the circumstances under which and the procedures that must be followed for the government to restrict or gain access to communications. For example, prosecutors may seek court permission to implement measures if deemed necessary to prevent a crime or arrest a criminal. In more serious cases where death or serious injury is deemed imminent, the prosecutors may take action first and file for permission from the courts.

Upon a court's approval, a prosecutor or the police may request from a telecommunications business operator communication data such as date of communication, the parties involved, the communication log and location tracking data.

The Criminal Procedure Act and the Military Court Act authorises the government to confiscate a person's communication data in certain cases for an investigation or trial.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Currently, there are no rules or regulations requiring market participants to maintain call interception capabilities. Legislation for this requirement was proposed, but failed to pass.

4.4 How does the state intercept communications for a particular individual?

Communication interception is permitted in three cases: (i) criminal investigation; (ii) matter impacting national security; and (iii) emergencies:

Criminal Investigation

Prosecutors may intercept communications of a criminal suspect with court approval. The maximum period for such an interception is two months, although this period may be extended for an additional two months. Such interception is only approved to investigate crimes concerning foreign aggression, diplomatic relations, public safety, duties of public officials and other crimes of a similar nature.

National Security

If there is a threat against national security, the National Intelligence Service may intercept communications of a Korean national with court approval. If the communications are between foreigners the intelligence agency may intercept communications with approval from the President. The interception can be conducted for up to four months with a possible extension for another four months.

Emergency

If there is an emergency and it is not feasible to obtain prior approval from the court, prosecutors or the National Intelligence Service may perform a communication interception without court approval, provided that approval is later obtained within 36 hours of the interception.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Under the ICNA, information and communications service providers that manage personal information of users must implement encryption technology for the safe storage of such information such as one-way encryption of passwords, encryption of resident ID numbers, bank account numbers and biometric information. There are no rules requiring the disclosure of encryption keys to the state.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Under the Secrets Act, telecoms operators must retain communications that have been subject to a wiretap or other intercept measure under the Secrets Act as follows:

- Date of communications, start and end time of communication, number of outgoing and incoming calls, frequency of use, and location tracking data must be retained for 12 months for mobile phone communication and six months for landline communications.
- Computer communications or internet log records of users and location tracking data must be retained for three months.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Audio-visual media is distributed through (i) terrestrial broadcasting, (ii) satellite broadcasting, (iii) program-providing business, (iv) CATV relay broadcasting, (v) CATV music broadcasting, (vi) game software, (vii) movie content, (viii) video content, and (ix) internet content.

Audio-visual media content is protected under copyright law.

The Broadcasting Act regulates distribution of audio-visual media via methods such as terrestrial broadcasting, satellite broadcasting, program-providing business, CATV relay broadcasting and CATV music broadcasting; and authorises the KCC to regulate content. For example, the KCC requires that broadcasters not harm the public peace. In addition, the KCC has set forth standards for programming such as restrictions on depictions of smoking, violence or sexual acts. Under the Broadcasting Act, any individual or entity seeking to be a broadcasting company must obtain a licence, receive approval and/or register with the KCC or MSIT.

The Internet Multimedia Broadcast Services Act regulates distribution of audio-visual media via the internet and categorises internet related businesses as a (i) service providing business, or (ii) content providing business. Content providing business, for example, must comply with requirements such as not harming the

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public peace and restrictions on depictions of smoking, violence or sexual acts. Under this act, any individual or entity seeking to be an internet content providing business must register with the MSIT. Internet content providers that satisfy the definition of a broadcasting business operator under the Broadcasting Act are not required to register with the MSIT.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Content regulation for broadcast via traditional distribution platforms is generally similar to content delivered over the internet or other platforms. However, the applicable laws are different.

For traditional distribution platforms such as television, the Broadcasting Act requires that broadcasting business operators comply with content rules and regulations issued by the Korea Communications Standards Commission. Accordingly, such operators must rate content broadcast over traditional platforms such as television with respect to matters such as violence and lewdness and indicate the content rating during the applicable broadcast.

For content delivered over the internet, the TBA and the ICNA require operators to rate content and indicate the rating in a similar way as required under the Broadcasting Act. Content delivered over the internet is not subject to the Broadcasting Act because it is considered "providing services" rather than broadcasting.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

General

In general, broadcasting business operators distributing audio-visual media are subject to requirements regarding management of the business such as scheduling of programmes, forming and managing channels and content related to commercials. The different types of licences are as follows:

Terrestrial broadcasting licence

A terrestrial broadcasting licence is required to manage and operate a business that broadcasts television signals via radio waves from an Earth-based transmitter. Under the Broadcasting Act, a terrestrial broadcasting licensee and its shareholders are subject to certain restrictions. For example, no shareholder can own more than 40% of the total outstanding shares of a terrestrial broadcasting business operator and a terrestrial broadcasting business operator cannot receive any investment from a non-Korean entity or individual (a "**Foreigner**").

CATV broadcasting licence

A CATV broadcasting business licence is required for a business that manages and operates CATV (or cable) broadcasting stations that provide multi-channel broadcasting via cables such as coaxial or fibre-optic cables. Under the Broadcasting Act, a CATV broadcasting licensee is subject to certain restrictions related to the receipt of investments from a Foreigner.

Satellite broadcasting licence

A satellite broadcasting business licence is required for a business that manages and operates wireless stations that broadcast content via satellite signals from satellites owned or leased by the operator. Under the Broadcasting Act, a satellite broadcasting licensee is subject to certain restrictions related to the receipt of investments from a Foreigner.

Program-providing business licence

A program-providing business licence is required by a business that exclusively uses all or some of the airing hours of a channel offered by a terrestrial broadcasting business operator, a CATV broadcasting business operator or a satellite broadcasting business operator. Under the Broadcasting Act, a programme-providing business licensee is subject to certain restrictions related to the receipt of investments from a Foreigner.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Generally, there are no laws or regulations related to the assignability of licences or restrictions on change of control of a licensee. However, certain types of change of control require approval from the MSIT or KCC, or require that a report be filed notifying such organisations of the relevant change. For example, mergers and spin-offs as well as changes to the largest shareholder of a licensee require approval from the MSIT or KCC.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Generally, telecommunications operators and internet service providers are not subject to liability for content carried over their networks since they do not have control over content produced by an audio-visual media company such as an internet media website. In contrast, for example, web portal service providers have been held to be liable for content when they have the ability to edit content, subject to various other requirements.

Internet service providers have a general duty to detect, delete and prevent distribution of child pornography, and may be subject to criminal liability if negligent in exercising such duty.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

If a content owner claims that its rights have been infringed the content owner may request that an internet service provider suspend the activity allegedly causing the infringement. The internet service provider will review such request and, for example, consider the background information and evidence provided by the content owner, and determine whether to suspend the infringing activity. In connection with a civil or criminal claim brought by the content owner against an alleged infringer, an internet service provider must provide such content owner with certain information such as any infringing content in its possession and the name and address of the transmitter of such infringing content.

Generally, telecommunications operators are not subject to any obligations related to content infringement.

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6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Generally, "net neutrality" principles have not been codified under the law nor have the courts provided clear guidance on this issue. Telecommunications operators and internet service providers may differently charge and/or block different types of traffic, but under the TBA "unreasonable discrimination" by a telecommunications business operator is not allowed. For example, an operator may not refuse to provide telecommunications services without "just cause" and the terms and conditions for common telecommunications services may not "unfairly discriminate" against specific persons.

In 2011 the KCC released guidelines regarding net neutrality addressing areas such as (i) protection of users' rights, (ii) transparent management of internet traffic, and (iii) prohibition on blocking legitimate content, applications, services and devices which are not harmful to the internet. However, these are merely guidelines, and are not enforceable under the law.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Under the TBA, telecommunication business operators who provide telecommunications services to minors must provide measures to block content that is harmful and obscene. Under the ICNA, the KCC may order a telecommunication service provider or a website operator to prohibit, limit or refuse to process information that is obscene or defamatory in nature.

Under the Act on the Protection of Children and Juveniles against Sexual Abuse, an online service provider has the obligation to properly manage and block child pornography.

There is no regulation of consumer VPN services.

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Chapter 18

Luxembourg

Wildgen S.A.

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The sector of the Information and Communication Technologies represents an important part of the Luxembourg economy. The share of the ICT sector in total gross added value is 6.6% (2012). Its share in total employment is 4.0% (2012).

In this respect, the International Telecommunication Union (ITU) found in 2014 that Luxembourg is the 10th most advanced ICT economy (among 166 countries) and is one of the countries offering the cheapest prices for ICT services.

The total revenue of electronic communications services marketed in the retail market amounts to 542 million euros excluding VAT for the year 2016.

There are, however, no figures available for the audio-visual media distribution sector.

The most significant operators of electronic communications are POST Telecom S.A., Eltrona Interdiffusion S.A., Orange Communications Luxembourg S.A., Tango S.A., Luxembourg Online S.A.

For the audio-visual media distribution sector, the most significant operators are the RTL Group and the SES Group as one of the most significant satellite operators in the world.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most important law that applies to the operation of electronic operation networks and the provision of electronic communication services is the law of 27 February 2011 concerning electronic communications networks and services. Said law was recently amended by a law concerning prepaid services on 7 June 2017.

Other laws may also apply to the sector of ICT. For example, the law of 8 June 2004 on freedom of expression in the media as amended and the law of 27 July 1991 concerning electronic media as amended aim to guarantee free access to multiple sources of information and the freedom of expression and information in electronic communications services.

Moreover, the law of 14 August 2000 concerning electronic commerce as amended would apply for the provision of information society and electronic commerce services.

Processing of personal data shall be realised in accordance with the law of 2 August 2002 concerning the protection of natural persons regarding processing of personal data as amended. Please note that this law shall be replaced on 25 May 2018 by Regulation (EU) 2016/679 of 27 April 2016 (the General Data Protection Regulation) that shall apply in every Member State of the European Union.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The main independent public authority that is competent in regulating the economic sectors, including the electronic communications sector, is the *Institut Luxembourgeois de Régulation* ("**ILR**"). The status and functioning of the ILR is determined by the law of 30 May 2005, as amended by the: (1) organisation of the *Institut Luxembourgeois de Régulation*; and (2) amendment of the amended law of 22 June 1963, whereby the salaries of civil servants were fixed by the state.

The *Autorité Luxembourgeoise Indépendante de l'Audiovisuel* ("**ALIA**") monitors the proper application of existing regulatory texts in the field of audio-visual media.

The *Conseil de la Concurrence* is responsible in ensuring the enforcement of anti-trust law in Luxembourg and may sanction anti-competitive practices in the sector of electronic communications.

Finally, the *Commission Nationale pour la Protection des Données* ("**CNPD**") ensures the compliance of operators with personal data protection rules applicable in Luxembourg.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The liberalisation of the electronic communications market in Luxembourg began with the law of 21 March 1997 on telecommunications. With the introduction of the law of 30 May 2005 concerning electronic communications networks and services (now replaced by the above mentioned law of 2011), the ILR has been required to carry out market analyses, assessing dominant operators on the market and specifying him/them necessary

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obligations for him/them to open networks to concurrence, so that the liberalisation of the sector of electronic communication may be effectively reached.

There are no provisions limiting foreign investments.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Luxembourg has been a member of the WTO since 1 January 1995.

As a Member State of the European Union, Luxembourg is subject to the commitments with the references GATS/SC/31 and GATS/SC/31.Suppl3.

As a Member State of the European Union, Luxembourg has implemented the telecom reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Electronic communications services are regulated under the law of 27 February 2011 concerning electronic communications networks and services as amended.

According to this law, the provision of electronic communications networks and services is freely exercised. However, providers of electronic communications networks and services shall notify to the ILR their intention to perform such activities at least 20 days before starting.

In order to provide a fair competition in the domain of electronic communications, the ILR is in charge of proceeding to market assessments in order to review if the market is competitive or not.

If a market is assessed as competitive and is still submitted to sector-specific regulatory obligations, then the ILR shall cancel the sector-specific regulatory obligations still in place for notified companies.

If a market is assessed as non-competitive, the ILR identifies companies with significant market power, on the market. The ILR may either order specific regulatory obligations to such companies, or modify or maintain already existing regulatory obligations.

The law also includes provisions about security and integrity of electronic communication networks and services, about the mandatory provision of a universal service for all users and about the rights of the end-user.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The authorities in charge of competition law in Luxembourg in the sector of electronic communications are the ILR and the *Conseil de la Concurrence*. They are both independent administrative authorities.

The ILR is placed under the authority of the Minister in charge of relations with the ILR (most of the time, the Minister of Communications and Media). However, the ILR has financial and administrative autonomy and performs its activities independently.

Both authorities are cooperating together in order to issue market assessment in the sector of electronic communications networks and services.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions of the ILR may be appealed before the Administrative Tribunal (*tribunal administratif*) according to articles 6 and 83 of the law of 27 February 2011 concerning electronic communications networks and services as amended.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

In the domain of electronic communication networks and services, operators shall only file a notification of their activities with the ILR at least 20 days before starting.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

The ILR proposes a standard form for the notification. The notification contains information about the identity of the applicant, contact details of representatives of the applicant, the type of network/services provided, a description of the networks/services provided and a contemplated date of start of the activities.

A fixed fee shall be paid for the first notification. Then, every notified company shall, each year, pay a fee covering the expenses of the activities of the ILR. Said fees are determined annually by the ILR and published not later than on 31 December of the preceding financial year.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Authorisations are only required when the entity wants to use scarce resources in order to provide an electronic communications network or an electronic communication service (namely radio-frequencies and numbering resources; please see our answers below).

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

According to article 37 of the law of 27 February 2011 concerning electronic communications networks and services as amended, any notified company shall enjoy a rite of passage over the public domains of the state and of the communes; this rite allows access to technical infrastructures and equipment as well as their location and installation.

The installation of infrastructures and associated resources must be carried out under conditions that are the least damaging to the public

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areas concerned, while respecting the environment and the aesthetic quality of the premises.

Such operations by a notified company are subject to a convention or, as the case may be for road domains of the state and municipalities and railways, a permission.

The ILR may decide that such resources shall be shared with other notified companies and the costs of sharing the resource or the property shared by each participating notified company.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Operators are obliged, in the case where another notified company may so request, to negotiate reciprocal interconnection.

In this respect, the ILR may impose certain obligations on notified companies (for example, to ensure the interconnection of their networks where it has not yet taken place, if it is necessary).

The ILR is also entitled to act as a mediator between notified companies in case of disputes. The results of the mediation shall be accepted by both parties to be binding.

A dispute can also be submitted to the ILR that will take a decision after hearing both parties.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The ILR may indeed impose on an operator who has significant market power over the publication of a reference offer which is sufficiently detailed to ensure that companies are not required to pay for resources which are not necessary for the requested service. It includes a description of the relevant offer divided into various elements according to market requirements, accompanied by the corresponding terms and conditions, including prices.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The ILR may impose obligations related to cost recovery and price control on an operator having significant market power for the supply of particular types of interconnection or access, in the case where a market analysis indicates that the operator concerned may, in the absence of effective competition, keep prices at an excessively high level or reduce prices, to the detriment of end users.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The ILR may impose accounting separation. The other types of separation are, however, not foreseen in the law of 27 February 2011 concerning electronic communications networks and services as amended.

For example, the historical operator *Entreprise des postes et télécommunications* has been determined as having a significant market power on the market of the wholesale physical access to the network infrastructure.

As a consequence, the ILR, according to Regulation 14/175/ILR of 28 August 2014 on the definition of the relevant market for the wholesale (physical) access to network infrastructure at a fixed position (Market 4/2007) and the obligations imposed on it in this respect, impose account separation on the *Entreprise des postes et télécommunications*. It shall, amongst others, organise, separate and detail accounting in such a way that the operating results for the unbundled access services are separated from those relating to the operation of the interconnection services and its other activities.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

The law of 22 March 2017 on measures to reduce the cost of deploying high-speed electronic communications networks and amending the amended law of 16 May 1975 on the status of co-ownership of built-up buildings was adopted in order to facilitate and encourage the deployment of high-speed electronic communications networks by promoting the joint use of existing physical infrastructures and by enabling more effective deployment of new physical infrastructures in order to reduce the costs associated with setting up these networks.

According to this law, a company providing the provision of public communications networks (for example: transport infrastructure like railway or physical infrastructure to transport electricity, gas, water, etc.) shall grant any reasonable request for access to its physical infrastructure made by a company in order to deploy high-speed electronic communications network elements.

This law implements the 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.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The law of 27 February 2011 concerning electronic communications networks and services as amended does not foresee the possibility for the ILR to set up retail price controls.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Companies providing such services shall publish transparent, comparable, adequate and up-to-date information concerning the prices and prices charged, the fees due at the time of termination of the contract and the general terms and conditions concerning access and use of the services provided by those companies to end-users consumers.

Consumers, as well as any end-users, that request it shall have the right to be provided with a written contract containing:

- the identity and address of the business;
- services provided (including, but not limited to, the minimum levels of quality of the services offered, the types of maintenance services provided and the support services provided (as well as how to contact these services));

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- the possibilities for the subscriber to include his or her personal data in a directory and the data concerned;
- details of the prices charged, the means by which updated information on all the applicable tariffs and maintenance costs can be obtained, the proposed payment methods and possible differences in costs related to the method of payment;
- the term of the contract and the conditions for renewal and interruption of services and contract;
- compensations and refund formulas that may apply where the quality levels of the services provided for in the contract are not met;
- the procedures for initiating dispute settlement proceedings; and
- what type of action the company may take to respond to a security or integrity incident or to respond to threats and vulnerabilities.

The universal service, to which every end-user shall have access, encompasses:

- the provision of fixed location access and the provision of telephone services;
- the provision of public pay telephones and other access points to public voice telephony services;
- the publication and provision of at least one telephone directory; and
- the provision of a telephone enquiry service.

In this respect, the ILR may require the company providing a universal service to offer consumers options or tariff formulas that differ from those offered under normal commercial conditions, in particular with a view to ensuring that low income end-users are not prevented from accessing universal service.

Likewise, the company providing the universal service is obliged to provide its subscribers with additional services, such as, for example, a free detailed invoice, phased payment of connection charges to the public communication network or more flexible conditions for the recovery of unpaid invoices to avoid the interruption of the services.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

According to article 47 of the law of 27 February 2011 concerning electronic communications networks and services as amended, the ILR shall establish and publish on its website a national numbering plan that is managed under its control. The ILR also determines the rules relating to numbering, numbering changes, use and structuring of numbers, assignment of numbers and the series of numbers for each notified company and each electronic communications service, number portability and access to and pricing of these access numbers.

A notified company may apply to the ILR for the allocation of blocks of numbers or individual numbers. An end user also has the right to apply for the assignment of individual numbers.

For each type of number, the allocation possibilities are determined by the national numbering plan.

Then, notified companies may assign numbers to end-users for electronic communications services which they have notified to the ILR.

Holders of allocations are obliged to respect the conditions of use of the numbers included in the decisions of the ILR.

2.17 Are there any special rules which govern the use of telephone numbers?

Special rules about the use of numbers are contained in the decisions of allocation of the ILR and Regulation 14/174/ILR of 14 July 2014.

2.18 Are there any obligations requiring number portability?

According to Regulation 14/174/ILR of 14 July 2014, a notified company shall ensure the portability of a fixed telephone number, when requested by an end-user. The use of the numbers must, however, remain in accordance with the national numbering plan.

Concerning mobile telephone numbers, the obligation of portability is absolute and applies to all notified companies.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The spectrum use is considered as an electronic communication service, therefore, it is regulated by the "*Service Fréquence*" as part of the "*Institut Luxembourgeois de la Régulation*", the law of the 27 February 2011 concerning electronic communications networks and services as amended and the law of 30 May 2005 concerning the organisation of radio wave management, last modified on 27 February 2011.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The ILR is the general authority responsible for the management of the radio frequency spectrum, it is also in charge of allocating user rights for radio frequencies. The ILR is granting licences in accordance to objective criteria, in a transparent and non-discriminatory manner. If the use of the same radio frequency spectrum is requested by several applicants, a public tendering procedure will take place, either by using a competitive selection or a comparative selection process. The ILR decides on a case by case basis, what selection process to use.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The frequency plan regulation determines under which conditions the use of a spectrum can be licence-exempted. Three different exemptions may apply. First, some applications may use the spectrum for emitting and receiving without a frequency assignment, secondly the use of some applications such as short range devices, alarm systems, reduced model controls without a frequency assignment may be granted under certain restrictions. Finally, the use of some applications might be granted without a frequency assignment but subject to an operator certificate and/or to specific conditions of use, to be specified by the ILR.

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3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The Grand-Ducal regulation of 21 February 2013 last modified on 8 November 2016, specifies the fees payable for the use of a radio frequency spectrum, prices are expressed in € per MHz or KHz. Those fees take into account the management costs of the frequencies and vary according to the type of use of the frequencies.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The law of 30 May 2005 as amended does not foresee such a situation.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

The law of 30 May 2005 as amended does not foresee such a situation.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

At the EU Level, a 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 sets up the legislative framework for cybersecurity across the European Union.

This directive foresees the adoption of a national cybersecurity strategy, the appointment of a competent national authority in this domain, the creation of a mechanism of cooperation between the Member States and the Commission, the adoption of risk management practices as well as the creation of a mechanism to report major security incidents.

Though Luxembourg has not yet implemented the directive, several laws are already in force in the domain of cybersecurity.

The law of 23 July 2016 establishing a *Haut-Commissariat à la Protection Nationale* ("**HCEN**") assigns to the HCEN the mission to take measures in order to prevent, anticipate or manage the risk of a reduction or discontinuity in the availability of supplies or services essential to safeguarding the vital interests or essential needs of all or part of the country or population offered through infrastructures.

In this respect, the Grand-Ducal Order of 10 February 2015 laying down governance for information security management and amending the Grand-Ducal Decree of 30 July 2013 appoints the HCEN as National Agency for the Security of Information Systems (abbreviated in French "**ANSSI**"). The mission of the HCEN as ANSSI is to define policies and guidelines for information security (classified and unclassified) and to monitor their effectiveness and relevance as well as to ensure that measures concerning the security of information systems are put in place and that their application is guaranteed.

On a more technical point of view, the Grand-Ducal Order of 30 July 2013 determining the organisation and responsibilities of the *Centre gouvernemental de traitement des urgences informatiques*, also known as the Computer Emergency Response Team Government [in English in the law] (the "**CERT**") as amended, foresees that the CERT shall:

- be the single point of contact dedicated to the treatment of all major security incidents affecting the networks and the communication and information processing systems of the administrations and services of the State; and
- be able to operate a specialised intervention team capable of taking responsibility for the prevention and response to major security incidents related to these communication and information processing systems.

Through the "Security Made In Lëtzebuerg" (SMILE) G.I.E operated by the Government of Luxembourg, several institutions were also created in the domain of cybersecurity for the private sector and communes including the Computer Incident Response Center Luxembourg (CIRCL), that acts as the CERT for the private sector and communes.

In criminal law, a whole section of the Luxembourg Criminal Code, introduced in 1993, is dedicated to offences in the domain of information technology (as, for example, illegal access to an automated data processing or transmission system). The last modification of those provisions took place with the law of 18 July 2014. Such law was adopted to implement the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Access to private communications by the state may result from:

- a criminal procedure, as specified in the provisions of the Criminal Procedure Code (in particular articles 88-1 *et seq.* for the monitoring of communications and articles 31, 33, 66, 67-1 for the access to data); or
- reasons of national security, as specified in the law of 5 July 2016 (1) reorganising the State Intelligence Service, and (2) amending the Code of Criminal Procedure, the law of 15 June 2004 on the classification of documents and on security clearances, and the law of 25 March 2015 fixing the salary and conditions of advancement of civil servants of the State.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

In principle, according to article 4 of the law of 27 February 2011 concerning electronic communications networks and services as amended, any company offering electronic communications services and its staff shall respect the secrecy of correspondence. However, operators and notified companies offering electronic communications services shall make available to the competent authorities free of charge the technical data and equipment enabling them to carry out their legal duties for the supervision of communications. Such interception capabilities shall only be used according to a legal authorisation.

Such a legal authorisation can result from article 88-1 *et seq.* of the Criminal Procedure Code, where the investigating judge may, by way of exception and by a specially motivated decision on the basis of the facts of the case and by reference to the conditions set out below, order the use of technical means of surveillance and control of all forms communication, if:

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- the purpose of the criminal prosecution is an act of a particular seriousness that carries a penalty with a maximum of not less than two years' imprisonment;
- the particular facts cause the person to be kept under surveillance suspicious of committing or participating in the offence or receiving or transmitting information to or from the accused or suspect; and
- if ordinary means of investigation are rendered inoperative by reason of the nature of the facts and the special circumstances of the case.

There is no distinction on the type of communications so that all types of electronic communications may be intercepted.

4.4 How does the state intercept communications for a particular individual?

Interceptions by the state may result from a criminal procedure as described above.

Interceptions may be justified for national security reasons under the law of 5 July 2016 (1) reorganising the State Intelligence Service, and (2) amending the Code of Criminal Procedure, the law of 15 June 2004 on the classification of documents and on security clearances, and the law of 25 March 2015 fixing the salary and conditions of advancement of civil servants of the State.

Such interceptions are only authorised for activities which threatens or may threaten national security, whether deployed within the country or from abroad, namely activities:

- which may relate to espionage, interference, terrorism, violent propensity, proliferation of weapons of mass destruction or defence related products and related technologies, organised crime or cyber threat, insofar as the latter two relate to the above-mentioned activities; and
- which may call into question the independence and sovereignty of the state, the security and functioning of the institutions, fundamental rights and freedoms, security of persons and property, the scientific and technical potential as well as the economic interests of the Grand Duchy of Luxembourg.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Article 3 of the law of 14 August 2000 concerning the electronic commerce as amended defines the principle that the use of cryptographic techniques is free.

Moreover, under the law of 30 May 2005 on the protection of privacy in the electronic communications sector as amended, all providers of electronic services shall take the appropriate technical and organisational measures in order to ensure the security of his services and, as the case may be, in cooperation with the operator of the network for the security of the network.

Those principles include the exceptions described above on the interception of communications and the access of data for a criminal procedure. In this case, the provider of electronic services would be obliged to provide the authorities with the appropriate technical means necessary to ensure the execution of the decision of the judge.

Under article 66 (4) of the Criminal Procedure Code, the judge may also order a person, other than the person to whom the instruction relates, that he considers to have a particular knowledge of the automated data processing or transmission system or the protection or encryption mechanism, access to the system, as well as to the understanding of data entered, protected or encrypted. Said person shall comply with the decision of the judge.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Providers of electronic communications services are obliged to retain traffic data and location data for a period of six months from the date of the communication. Traffic data includes all data processed for the purpose of routing a communication via a network of communications or billing while location data include all data processed in an electronic communications network or service indicating the geographical position of the terminal equipment of a user of a publicly available electronic communications service.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is regulated by the law of 27 July 1991 concerning electronic media as amended.

Under this law, no person may transmit an audio-visual service through radio-frequency, cable or satellite without first obtaining a concession or permission.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

There are common rules for all audio-visual programmes, no matter on which platforms they are transmitted. Common content regulation includes the prohibition to contain any incitement to hatred based on race, sex, opinion, religion or nationality.

Concerning advertising in audio-visual media, it shall:

- be readily recognisable as such. Underground audio-visual commercial communications are prohibited;
- not use subliminal techniques;
- not infringe human dignity;
- not discriminate on the grounds of sex, racial or ethnic origin, nationality, religion;
- conviction, disability, age or sexual orientation, nor do they promote such discrimination;
- not encourage behaviour prejudicial to health or safety; or
- not encourage behaviour that is seriously prejudicial to the protection of the environment.

There are, however, special rules for each specific platform. For example, it includes the protection of minors or for radio broadcasting, general restrictions on the volume and the nature of the advertising messages contained in the Luxembourg radio services.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The transmission of an audio-visual service through radio-frequency, cable or satellite is subject to a permission or concession.

Any concession or permission shall be accompanied by specifications, the provisions of which shall be complied with at all times by the beneficiary.

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However, providers of audio-visual media services in Luxembourg which intend to provide a television service which is not a Luxembourg broadcasting service, a Luxembourg satellite service or a Luxembourg cable service must, at the latest twenty days before the launch of the service, notify this intention to the Minister having the media in his attributions. There is no concession or permission in this case. The same rules apply for on-demand audio-visual services.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Permission or concession are personal and are not assignable. There is no specific provisions on the change of control of an entity that received a permission or concession.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Luxembourg implemented the E-commerce Directive 2000/31/EC as early as 14 August 2000, with the law of 14 August 2000 concerning electronic commerce (hereinafter the E-commerce Law).

Article 60 of the E-commerce Law foresees a liability exclusion for providers which transmit information on a communication network as provided by a recipient of the service or for providers providing access to the communications network, provided that they:

- do not initiate the transmission;
- do not select the receiver; and
- do not select or modify the content.

For caching (the automatic, intermediate and temporary storage of information made with the sole objective of making the subsequent transmission of the information more effective at the request of other recipients of the service), service providers are not liable provided that they:

- do not alter the information;
- comply with the conditions for access to the information;
- comply with the rules for updating information, widely recognised and used by the industry;
- do not interfere with the licit use of the technology, widely recognised and used by the industry, in order to obtain data on the use of information; and
- act promptly to remove the information they have stored or to make access to it impossible, when they have effective knowledge of the fact that the information was withdrawn where it originally was in the network.

For hosting services, article 63 of the E-commerce Law foresees service providers are not liable provided that they:

- are not aware of the illegal content; and
- as soon as he is aware of such illegal content, acts promptly to withdraw the information or make access to it impossible.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Regarding the activities of transmission, caching and hosting, the E-commerce Law does neither impose any obligation on telecom operators to assist content owners, nor to monitor the data transferred and hosted on behalf of a content owner. However, the judge may issue orders on providers concerning, for example, inquiry measures as set in the Civil Procedure Code. The provisions of the Criminal Procedure Code also apply (as described above).

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015, establishing measures relating to access to an open Internet specifies in its article 3 that service providers shall treat all traffic equally and without discrimination, restriction or interference, regardless of the sender and recipient, the content viewed or broadcast, the applications or services used or provided or the terminal equipment used.

Traffic management measures are only allowed if they are transparent, non-discriminatory and proportionate and are not based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic.

Traffic management measures are also allowed if they are necessary to:

- comply with Union legislative acts, or national legislation;
- preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users; and
- prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

There are no obligations to block access to certain sites or content, unless a specific order by a judge has been issued.

As for VPN services, they are neither regulated nor blocked in Luxembourg.

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Qualified as *Avocat à la Cour* in Paris and Luxembourg, Emmanuelle Ragot, Partner, heads Wildgen's IP/TMT practice group as well as Wildgen 4 innovation, Wildgen legal hub for start-up businesses. Her approach is totally client-focused and she works upstream with her clients in order to implement the appropriate strategy to their needs. Throughout more than 20 years of practice in London, Paris and Luxembourg, Emmanuelle has developed a sound experience in protecting her clients' interests. Focused on both litigation and advisory work, she made a name for herself in litigation specifically related to IP rights and represents high-profile local and international clients in the protection, acquisition, negotiation, use, distribution of IP rights and IP tax structuring. She also advises her clients on data compliance for multi-jurisdiction TMT projects, drafting of agreements and negotiation of contracts related to the technology sector. Her field of activity includes data protection, technology regulation and general regulatory work.

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The Wildgen IP/TMT partner and team have achieved prestigious top rankings in the most authoritative directories in the legal profession in Europe.

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Chapter 19

Macau

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Telecommunications

The telecommunications sector is framed by Law no. 14/2001, of August 20 (the Telecommunications Act (http://bo.io.gov.mo/bo/i/2001/34/lei14.asp)), which defines the basis of the telecommunications policy of the MSAR, as well as the general framework for the establishment, management and operation of telecommunication networks and the provision of telecommunications services; however, the provisions of said law do not apply to broadcasting services, terrestrial or satellite, in particular to television and sound broadcasting services. Telecommunications shall hence be understood as the transmission, emission or reception of symbols, signs, writing, images, sounds or information of any nature by wire, radio, electricity or other electromagnetic systems.

Law no. 14/2001 also stipulates the objectives of such policy, which include: to gradually liberalise the installation of public telecommunications networks and the provision of public use telecommunications services; to ensure access to telecommunications, at reasonable tariffs and prices, in a non-discriminatory manner and in conditions of quality and efficiency that meet their needs, to the whole population and also to economic and social activities; to ensure the existence and availability of the universal telecommunications service; to ensure equality and transparency of conditions of competition by promoting the diversification of services in order to increase their supply and quality standards to be compatible with the requirements of users; and to ensure the interoperability of public telecommunications networks, as well as the portability of the customer number, among others.

It is incumbent upon the Government to oversee and supervise telecommunications and the activities of telecommunications operators, without prejudice to the specific competencies of the Macau Post Office (in Portuguese, *"Direcção dos Serviços de Correios"*), as we shall see below.

Regarding the hardware part of the telecommunications equation, the Administrative Regulation no. 41/2011, of December 30 (http://bo.io.gov.mo/bo/i/2011/52/regadm41.asp) establishes the system for the installation and operation of fixed public telecommunications networks, understood as telecommunications networks, based on cables, optical fibres, radio-electric or other electromagnetic systems, which connect local fixed points to each other or to the outside of the MSAR, and which support public telecommunications services. The installation and operation of public fixed telecommunications networks are subject to licensing, in accordance with the terms of this administrative regulation.

Furthermore, the Administrative Regulation no. 15/2002, of August 12 (http://bo.io.gov.mo/bo/i/2002/32/regadm15.asp) establishes the regime for the management and allocation of the several telecommunication numbering resources, and the Administrative Regulation no. 41/2004, of December 22 (http://bo.io.gov.mo/bo/i/2004/51/regadm41.asp) establishes the regime of interconnection of public telecommunications networks, which shall be made in an environment of equal conditions of competition, in order to ensure that it is carried out in a timely and reasonable manner, ensuring in particular the inviolability and confidentiality of communications, the non-discrimination in the provision of interconnection, the interoperability of telecommunications services, and the integrity of telecommunications networks, installations and equipment assigned to the interconnection.

Regarding the licensing of telecommunications services, the Administrative Regulation 32/2000, of September 11 (http://bo.io.gov.mo/bo/i/2000/37/regadm32.asp), determines the legal regime for provisional licensing of the activities of public network operator and the provision of telecommunications services for public land mobile use, up to a maximum of three licenses, operating in certain frequency bands, and with the adoption of the concepts established by the International Telecommunication Union (ITU). The operation of public telecommunications networks and the provision of telecommunications services for public land mobile use is further defined by the Administrative Regulation no. 7/2002, of April 15 (http://bo.io.gov.mo/bo/i/89/36/lei08.asp), which establishes that said activity is subject to licensing, in accordance with this administrative regulation.

Radio broadcasting

Radio broadcasting in the MSAR is framed by Law no. 8/89/M, of September 4 (http://bo.io.gov.mo/bo/i/89/36/lei08.asp), which established the legal regime for radio and television broadcasting. In accordance with said legislation, the purposes of radio broadcasting are:

a) to contribute to the formation of citizens with respect to the ethical and cultural values in force;

b) to contribute to the information of citizens, guaranteeing them the right to inform and to be informed, without hindrance or discrimination; and

c) to contribute to the promotion of social and cultural progress and to the civic and social awareness of citizens.

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Television broadcasting is defined as a public service and is exercised under a concession contract, whereas the activity of sound broadcasting is subject to the licensing regime, depending its exercise on the attribution of a licence. Both awards are normally preceded by a public tender.

Law no. 8/89/M also creates the Broadcasting Council, an independent body that functions for administrative purposes with the Media Office (which shall be analysed below), with the responsibility to guarantee:

i. the independence of the concessionaires and broadcasting operators, especially in face of political and economic power;
ii. the safeguard of pluralism and freedom of expression and of thought;
iii. the accuracy and objectivity of the information;
iv. the quality of the programming; and
v. the defence of the rights and the respect of the obligations set forth in the law.

Furthermore, Law no. 8/89/M stipulates that the right of expression of thought and the right to information are exercised without any form of censorship, impediment or discrimination, respecting individual freedoms and the right of citizens to their moral integrity, good name and reputation. Also, the broadcasting activity is carried out independently and autonomously in the field of programming, and no public or private entity can prevent or impose the broadcasting of programs. However, broadcasting operators must respect the values of detachment, impartiality and truth in the dissemination of information by refraining from disseminating false or unproven news or giving journalistic treatment to the facts that may distort or mislead the public.

Regarding the administrative procedures related to radio communication services, Decree-Law no. 48/86/M, of November 3 (http://bo.io.gov.mo/bo/i/86/44/declei48.asp) establishes the rules by which said administrative procedures shall be governed, in particular as regards to:

a) the concession, installation and operation of radio communications networks or stations;
b) radio operators;
c) the approval of radio communications equipment; and
d) the commercialisation of radio communications equipment.

Finally, regarding television broadcast, Administrative Regulation no. 8/2014, of April 8 (http://bo.io.gov.mo/bo/i/2014/14/regadm08.asp), authorised the establishment of a commercial company between the MSAR, the *Teledifusão de Macau, S.A.* and the Macau Post Office, named "Macau Basic Television Channels, Limited" (in Chinese "澳門 基本 電視 頻道 股份有限公司"), with the purpose of providing reception assistance services of basic television channels for residents under the terms of the concession contract.

Internet

The regime of access and exercise of the activity of provision of Internet services is set out by Administrative Regulation no. 24/2002, of November 4 (http://bo.io.gov.mo/bo/i/2002/44/regadm24.asp), which subjects such activity to licensing under the terms of said administrative regulation and also establishes the requirements and process for granting a licence, the process for requesting a licence, as well as how to exercise the activity of providing Internet services and the corresponding sanctioning regime.

Previously to the entry into force of Administrative Regulation no. 24/2002, the provisional licensing of internet services was regulated by Administrative Regulation 35/2000, of October 3 (http://bo.io.gov.mo/bo/i/2000/40/regadm35.asp), which established the requirements to be fulfilled by those interested in the provision of the services described therein.

Press

The freedom of press in the MSAR is guaranteed by its Basic Law and framed by the Law no. 7/90/M, of August 6 (the "Press Law") (http://bo.io.gov.mo/bo/i/90/32/lei07.asp), which regulates the exercise of freedom of the press, the right to information and the activity of journalistic, editorial and news organisations. Namely, the law guarantees and regulates the right to information, freedom of the press, freedom of access to sources of information, guarantee of professional secrecy and independence of journalists, freedom of publication and dissemination, and freedom of enterprise.

The law also regulates the organisation of publications and press registration, the exercise of the right of reply, denial, rectification, and the right to clarification, as well as the regime regarding liability for unlawful acts not provided for in the common criminal legislation.

Finally, the law created the Press Council, whose duties would have been to ensure:

i. the independence of the press, in particular *vis-à-vis* political and economic power;
ii. the pluralism and freedom of expression and of thought by the press; and
iii. the protection of the public's right to information.

However, the Press Council never came into effect, as its composition was never properly regulated.

In regards to the press registry provided in the Press Law, the Decree no. 11/91/M, of January 28 (http://bo.io.gov.mo/bo/i/91/04/port11.asp) regulates the way in which the press register is processed, through its own media, with the Media Office, described below.

The Media Office (in Portuguese, *"Gabinete de Comunicação Social"*) is defined by the Administrative Regulation no. 7/2012, of March 5 (http://bo.io.gov.mo/bo/i/2012/10/regadm07.asp), which regulates the service of coordination, study and technical support to the Government and services of the Administration, in the area of social communication by said Office, as well as its respective attributions.

The Media Office has several responsibilities which were assigned by the Administrative Regulation no. 7/2012, notably:

a) to collaborate in the definition of the media policy of the MSAR and to issue an opinion on matters of social communication of interest to the MSAR;
b) to ensure the implementation of media activities in matters of official information;
c) to promote, within its scope or in collaboration with other services of the Administration and companies with total or partially public capital, the disclosure of facts that may contribute to a better knowledge of the reality of the MSAR;
d) to promote and support initiatives to improve the official information dissemination system;
e) to give technical support to the Government and to the services of the Administration in its relations with the organs and agents of the media; to support the organs and agents of the media in the performance of their duties;
f) to study and propose guidelines for political action in support of the media and ensure its implementation and monitoring; to promote and support initiatives aimed at improving the quality of the media sector;
g) to design, plan and execute, by its own means or in collaboration with the other services of the Administration and companies with total or partially public capital, actions of collective interest that aim at motivating and sensitising the public opinion; to foster cooperation and exchange activities with the media, based outside the MSAR;
h) to promote the conclusion of cooperation protocols and liaise with media bodies;

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i) to ensure the collection, systematic analysis and processing of written and audiovisual information material from the media;

j) to ensure the editorial activity of the Media Office;

k) to register the entities that own news, editorial and news organisations of the MSAR and its correspondents and other forms of representation of the media located outside the MSAR;

l) to proceed with the registration of MSAR periodicals; and

m) to perform all other attributions legally assigned to it.

The Media Office is composed of the following Departments: Information Department; Department of Studies and Promotion; Computer and Archive Division; and Administrative and Financial Division.

Other legislation

In regards to entities which are in contact with or may generally influence the telecommunications sector, we would first underline the Macau Post Office, a body with legal personality and administrative, financial and patrimonial autonomy, with the purpose of providing public postal services and of regulating, supervising, promoting and coordinating all activities related to the telecommunications sector in the MSAR, and also of serving as a credit institution, which organic regulation was first approved by the Decree-Law no. 2/89/M, of January 9 (http://bo.io.gov.mo/bo/i/89/02/declei02.asp).

The Macau Post Office integrates several departments, of which we highlight:

- the Postal Operations Department, which is the operational sub-unit in the area of postal traffic with origin, transit or destination in the MSAR, as well as postal relations of an operational nature with international institutions;
- the Electronic Services Department, which is the organic sub-unit responsible for electronic certification services, secure electronic postal services, development of CTT postal and computer technology systems, and electronic commerce services;
- the Telecommunications Management Department, which is the sub-unit responsible for supporting the definition of telecommunications policy, including telecommunications and broadcasting services, and for the management and monitoring of its activities, with the exception of broadcasting content; and
- the Department of Information Technology Development and Management of Resources, which is the sub-unit responsible for supporting the definition of IT policies, promoting the application of these technologies, promoting cooperation in this field with entities outside the MSAR, as well as for the planning and management of public telecommunications resources and the coordination of the use of telecommunications resources in Macau and abroad.

As for the market's most significant players, kindly note the following:

Telephone/internet

- Companhia de Telecomunicações de Macau S.A.R.L. (revenue in 2016: 1,081,156,035 MOP (http://bo.io.gov.mo/bo/i/89/02/declei02.asp)).
- Hutchison Telephone, Macao.
- Smartone Mobile Communications (Macao) Ltd.
- China Telecom (Macau) Cl. Ltd.
- MTEL – Telecommunication Company Limited.

Television/Radio

- TDM – Teledifusão de Macau, S.A. (revenue in 2016: 18,980,000 MOP (http://portugues.tdm.com.mo/report/2016FIN_report_pt.pdf)).
- TV Cabo Macau, S.A.

Press

- Diário de Macau – Empresa Jornalística e Editorial, Lda.
- Edições Va Kio, Limitada.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms and Internet

- Law no. 14/2001, of August 20 (the Telecommunications Act), which defines the basis of the telecommunication policy of the MSAR, as well as the general framework for the establishment, management and operation of telecommunications networks and the provision of telecommunications services. As stated above, the provisions of said law do not apply to broadcasting services, terrestrial or satellite, in particular to television and sound broadcasting services.
- Administrative Regulation no. 24/2002, of November 4, which sets out the regime of access and exercise of the activity of provision of Internet services and subjects such activity to licensing under the terms of said administrative regulation.

(b) Audio-visual media distribution

- Law no. 8/89/M, of September 4, which established the legal regime for radio and television broadcasting and creates the Broadcasting Council, an independent body that functions for administrative purposes with the Media Office.
- Law no. 7/90/M, of August 6 (the "Press Law"), which regulates the exercise of freedom of the press, the right to information and the activity of journalistic, editorial and news organisations.
- Administrative Regulation no. 7/2012, of March 5, which regulates the service of coordination, study and technical support to the Government and services of the Administration, in the area of social communication by the Media Office (in Portuguese, "*Gabinete de Comunicação Social*"), as well as its respective attributions.
- Decree-Law no. 2/89/M, of January 9, which first approved the organic regulation of the Macau Post Office, a body with legal personality and administrative, financial and patrimonial autonomy, with the purpose of providing public postal services and of regulating, supervising, promoting and coordinating all activities related to the telecommunications sector in the MSAR, and also of serving as a credit institution.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms and internet

The Secretary for Transportation and Public Works is the government ministry responsible for the telecommunications sector within the MSAR Government, as per Administrative Regulation no. 6/1999, of December 20 (http://bo.io.gov.mo/bo/i/1999/01/regadm06.asp), which determines the organisation, competencies and functioning of public services and entities. Also, Law no. 14/2001 stipulates that it is incumbent upon the Government to oversee and supervise telecommunications and the activity of telecommunications operators.

As stated above, the Macau Post Office is the entity responsible for providing public postal services and for regulating, supervising, promoting and coordinating all activities related to the telecommunications sector in the MSAR. Within the Macau Post Office, the following departments have a role in the regulation of telecommunications and internet:

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- the Telecommunications Management Department, which is the sub-unit responsible for supporting the definition of telecommunications policy, including telecommunications and broadcasting services, and for the management and monitoring of its activities, with the exception of broadcasting content;
- the Electronic Services Department, which is the organic sub-unit responsible for electronic certification services, secure electronic postal services, development of CTT postal and computer technology systems, and electronic commerce services; and
- the Department of Information Technology Development and Management of Resources, which is the sub-unit responsible for supporting the definition of IT policies, promoting the application of these technologies, promoting cooperation in this field with entities outside the MSAR, as well as for the planning and management of public telecommunications resources and the coordination of the use of telecommunications resources in Macau and abroad.

(b) Audio-visual media distribution sectors

As indicated above, the Media Office is defined by the Administrative Regulation no. 7/2012, of March 5 (http://bo.io.gov.mo/bo/i/2012/10/regadm07.asp), which regulates the service of coordination, study and technical support to the Government and services of the Administration, in the area of social communication by said Office, as well as its respective attributions. Such Office is in the hierarchical or tutelary dependence of the Chief Executive, in accordance with Administrative Regulation no. 6/1999, of December 20.

Law no. 8/89/M, of September 4, established the legal regime for radio and television broadcasting and created the Broadcasting Council, an independent body that functions for administrative purposes with the Media Office, with the responsibility to guarantee:

i. the independence of the concessionaires and broadcasting operators, especially in face of political and economic power;
ii. the safeguard of pluralism and freedom of expression and of thought;
iii. the accuracy and objectivity of the information;
iv. the quality of programming; and
v. the defence of the rights and the respect of the obligations set forth in the law.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

As a rule, in accordance with the MSAR Basic Law (http://bo.io.gov.mo/bo/I/1999/leibasica/index.asp), the capitalist system in Macau shall remain unchanged for 50 years after the return of Macau to the People's Republic of China. Also, the Basic Law expressly states that the right to property of companies and investments from outside the MSAR are protected by law.

In regards to the telecommunications sector, Law no. 14/2001 provides that the concession and licensing of the establishment and operation of networks and the provision of telecommunications services is incumbent upon the Government. The same Law further stipulates that the operation of public telecommunications services requires the establishment, management and operation of the infrastructures that constitute the basic telecommunications network and the provision of fixed telephone services, as well as other services considered fundamental, under the conditions defined in the applicable legislation or in concession contracts.

The legal regime for the installation and operation of fixed public telecommunications networks (Administrative Regulation no. 41/2011) states that only entities which are commercial companies regularly incorporated in the MSAR, and whose corporate purpose includes the exercise of the activity to be licensed, can be licensed. The same is to be said for the legal regime for the provision of internet service providers (Administrative Regulation no. 24/2002), which requires applicants to be commercial companies regularly incorporated in the MSAR, and whose corporate purpose includes the provision of Internet services to be licensed.

Regarding radio and television broadcast, Law no. 8/89/M determines that the television broadcast activity is subject to a concession contract and may be granted to any legal person that is incorporated as such, has its head office in Macau, whose purpose is the exercise of the activity to be granted and offers guarantees of suitability, technical qualification and financial capacity. Similarly, the activity of radio broadcasting is subject to a permit and may be exercised by any legal person having its head office in Macau and offers guarantees of suitability, technical qualification and financial standing.

Under the Press Law (Law no. 7/90/M), the constitution of newspaper companies, editorial companies and news organisations is free, in accordance with the applicable law. However, the registration of entities that own news, editorial and news organisations, indicating their name or company name, permanent establishments, composition of the corporate bodies and distribution of share capital, as well as the registration of correspondents and other forms of representation of media outlets located outside the MSAR, with the indication of their complete identification and the information body for which they perform their functions, must be made with the Media Office prior to the beginning of any such activities.

Hence, the sectors indicated above are generally open to foreign investment – however, they are still subject to licensing/authorisation under the applicable legislation.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

The MSAR, China has been a WTO member since 1 January 1995 and a member of GATT since 11 January 1991. Furthermore, the MSAR Basic Law also determines that Macau shall continuously effectuate its free trade policy with freedom in the movement of goods, intangible assets and capital.

Macau SAR has not made commitments under GATS regarding telecommunications (http://bo.io.gov.mo/bo/I/1999/leibasica/index.asp). The telecommunications reference paper has not been adopted nor implemented in Macau SAR.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

As indicated above, Law no. 14/2001 defines the foundations of the telecommunications policy of the MSAR, as well as the general framework which regulates the establishment, management and exploration of telecommunications networks and the provision of telecommunications services rendered. The aforesaid law stipulates that it is the competence of the Government to superintend and

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supervise the telecommunications sector, as well as the activity of telecommunications operators.

Also, the objectives of such policy include: to gradually liberalise the installation of public telecommunications networks and the provision of public use telecommunications services; to ensure access to telecommunications, at reasonable tariffs and prices, in a non-discriminatory manner and in conditions of quality and efficiency that meet their needs, to the whole population and to economic and social activities; to ensure the existence and availability of the universal telecommunications service; to ensure equality and transparency of conditions of competition by promoting the diversification of services in order to increase their supply and quality standards compatible with the requirements of users; and to ensure the interoperability of public telecommunications networks, as well as the portability of the customer number, among others.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

As indicated above, the Government of the MSAR has the responsibility to oversee and supervise telecommunications and the activity of telecommunications operators. Furthermore, the Macau Post Office is the entity whose purpose is to provide public postal services and also to regulate, supervise, promote and coordinate all activities related to the telecommunications sector in the MSAR, as per the Decree-Law no. 2/89/M. Within the Macau Post Office, the Telecommunications Management Department is the sub-unit responsible for supporting the definition of telecommunications policy, including telecommunications and broadcasting services, and for the management and monitoring of its activities, with the exception of broadcasting content.

Although the Macau Post Office is a body with legal personality and administrative, financial and patrimonial autonomy, under Decree-Law no. 2/89/M, it is under the hierarchical or tutelary dependence of the Secretary for Transport and Public Works, in accordance with Administrative Regulation no. 6/1999, and therefore is not independent from the Government of the MSAR.

There are no MSAR regulatory authorities for competition law.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Under the Law no. 9/1999, of December 20 (http://bo.io.gov.mo/bo/i/1999/01/lei09.asp), which approved the Basic Law on Judicial Organisation, the appeals of decisions of the Macau Post Office shall be made with the Administrative Courts of Macau. If, however, the decision comes from the Chief Executive or from the Secretary of Transportation and Public Works (namely, regarding the imposition of fines), the appeal shall be lodged with the Second Instance Court, under the same legislation.

The procedure for appeal shall follow the regime set out in the Code of Administrative Procedure Litigation, approved by the Decree-Law no. 110/99/M, of December 13 (http://bo.io.gov.mo/bo/i/99/50/codpacpt/declei110.asp).

Regarding competition law, as previously stated, no such regulatory entities exist in the MSAR – the international trade obligations of Macau under the WTO framework or its bilateral trade relations with China and European Union have not prompted the adoption of specific competition law regime.

There are nonetheless certain provisions in the Commercial Code (article 156 and following), approved by Decree-Law no. 40/99/M, of August 3 (http://bo.io.gov.mo/bo/i/99/31/codcompt/declei40.asp), which provide for the indemnity of damages caused by anti-competition practices. Article 170 of the Commercial Code provides that the legal action by unlawful competition must be filed before a court within one year from the date in which the person sustaining the damage was aware or could necessarily have had knowledge of the person who provoked them, but never after three years from the date in which they occurred. Also, article 172 of the Commercial Code provides that damages suffered by violations of the competition legislation in Macau are indemnifiable.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The operation of public telecommunications networks and of public telecommunications services can be carried out by duly licensed telecommunications enterprises, under regulations to be approved by the Government regarding the access to a specific activity. The licence to exercise such activities shall define the terms and conditions under which they are authorised to carry out the activity, *inter alia* universal service obligations and the infrastructures owned by authorised telecommunications companies which they can install for the operation and the connection to the basic telecommunications network.

Under the Administrative Regulation no. 41/2011, the installation and operation of public fixed telecommunications networks are subject to licensing, in accordance with the terms of this administrative regulation. The same applies to the operation of public telecommunications networks and to the provision of telecommunications services for public land mobile use, which is also subject to licensing, in accordance with Administrative Regulation no. 7/2002, and to the access and exercise of the activity of provision of Internet services, under Administrative Regulation no. 24/2002.

Hence, these various applicable legislations do not differentiate between general and individual authorisations for the purpose of providing telecommunications services.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

This is not applicable.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Public telecommunications networks and public land mobile telecommunications licence (Administrative Regulation no. 7/2002)

The allocation of licences under Administrative Regulation no. 7/2002 is subject to a public tender, and only those entities that meet the following requirements can be licensed:

i. possess the nature of a commercial company regularly incorporated in the MSAR, whose corporate purpose includes the exercise of the activity to be licensed, with a capital stock of no less than MOP10,000,000 (ten million patacas);

ii. have the technical capacity and appropriate experience to fulfil the obligations and other specifications of the licence that they propose to obtain, having, in particular, staff qualified to carry out the activity;

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iii. have adequate economic and financial capacity; and

iv. possess updated and adequate accounting for the analyses required for the project that they seek to develop.

The entities to which licences are granted are obliged to reinforce the deposit to the amount set in the public tender regulations, within 30 days after the publication of the dispatch ordering the allocation of the licence, in order to guarantee the obligations assumed and the fines or damages that may be due under the licensed activities.

The licensed entity is subject to the payment of the following fees, whose amounts and payment deadlines are set by order of the Chief Executive:

a) emission and renewal fees; and

b) an annual operating fee, corresponding to a percentage of the gross revenues from operating the services provided under the licensed activities.

Licences are granted for a maximum period of eight years, and may be renewed for the same period – however, the duration of the licence is not defined by Administrative Regulation no. 7/2002 and, therefore, it is decided by the Chief Executive on a case-by-case basis.

The licence is transferable, whether for a consideration or free of charge, subject to prior authorisation by the Chief Executive. However, the entity to whom the licence is transmitted shall, under penalty of nullity of the transfer, fulfil the requirements referred to above.

Public fixed telecommunications networks licence (Administrative Regulation no. 41/2011)

Regarding the operation of public fixed telecommunications networks, the allocation of licences is subject to a public tender, and only entities that fulfil the following requirements can be licensed:

i. possess the nature of a commercial company regularly incorporated in the MSAR, whose corporate purpose includes the exercise of the activity to be licensed;

ii. are endowed with a fully paid up capital of no less than MOP50,000,000;

iii. have the technical capacity and appropriate experience to fulfil the obligations and other specifications of the license that they propose to obtain, having, in particular, a staff qualified to carry out the activity;

iv. have adequate economic and financial capacity; and

v. have up-to-date financial information appropriate to the analysis of the proposed development project.

The entities to which licences are issued are obliged to provide a deposit of MOP2,000,000, within 30 days of the publication of the allocation order, to guarantee the obligations assumed and the fines or indemnities that may be due within the scope of the licence.

The licensed entity is also subject to the payment of licence fees and renewal fees, as well as of a pecuniary fee for the operation of the licensed activities, the amounts and payment deadlines of which are set by order of the Chief Executive.

Licences are granted for a maximum period of 15 years, and may be renewed for periods not exceeding the licensed period – however, the duration of the licence is not defined by Administrative Regulation no. 41/2011 and, therefore, it is decided by the Chief Executive on a case-by-case basis.

The licence is transferable, whether for a consideration or free of charge, subject to prior authorisation by the Chief Executive. However, the entity to whom the licence is transmitted shall, under penalty of nullity of the transfer, fulfil the requirements referred to above.

Internet services licence (Administrative Regulation no. 24/2002)

The request for the granting of a licence is formulated through an application addressed to the Chief Executive, and only entities fulfilling the following requirements may be licensed as Internet service providers:

i. possess the nature of a commercial company regularly incorporated in the MSAR, whose corporate object includes the provision of Internet services;

ii. possess the technical capacity and appropriate experience to fulfil the obligations and other specifications of the licence that they wish to obtain, having, in particular, a staff qualified to carry out said activity;

iii. have adequate economic and financial capacity; and

iv. have updated and adequate accounting for the analyses required for the project that they intend to develop.

The request for the granting of a licence is made through an application addressed to the Chief Executive, signed by a person with powers to bind the applicant, with the signature notarised in that capacity, and accompanied by the following documents:

- proof of compliance with the requirements referred to above;
- detailed proposal on the operation of the services, embodied in a technical plan to be developed, including, in particular, the configuration of the technological systems to be used, with reference to the access methods and the necessary equipment, as well as the development planning of the systems and services;
- economic and financial plan including the price system to be adopted;
- organisational structure of the applicant, including the identification and curriculum of its principal officials, and, where possible, financial statements and audit reports on the accounts for the last three financial years; and
- any other information which the applicant considers relevant for the assessment of his application.

The Telecommunications Management Department is responsible for analysing and issuing an opinion on the licence application, and may request from the applicants any clarifications and additional elements that may prove necessary for their complete analysis.

The licence is valid for a maximum period of five years, and may be renewed for periods not exceeding five years, upon request of the provider, and at least 90 days before the end of the period of validity.

The licence is transferable, whether for a consideration or free of charge, subject to prior authorisation by the Secretary for Transport and Public Works. However, the entity to whom the licence is transmitted shall, under penalty of nullity of the transfer, fulfil the requirements referred to above.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

In accordance with Law no. 14/2001, the expropriation and constitution of administrative easements necessary for the construction and radio-electric protection of the facilities necessary for the supervision of the use of the radio-electric spectrum, as well as for the installation, protection and conservation of the infrastructures of public telecommunications networks, is allowed under the terms of the law.

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The regime for expropriation and constitution of administrative easements is governed by Law no. 12/92/M, of August 17 (http://bo.io.gov.mo/bo/i/92/33/lei12.asp), which defines the rules regarding the regime of expropriations for public utility, and also by Decree-Law no. 43/97/M, of October 20 (http://bo.io.gov.mo/bo/i/97/42/declei43.asp), which further develops said legal regime.

Also, Administrative Regulation no. 41/2011 stipulates that, without prejudice to compliance with the legislation and other regulations in force in the MSAR and after obtaining the appropriate administrative authorisations, the licensed entities are entitled, *inter alia*, to:

- perform works of installation, repair and maintenance of telecommunications networks and conduits, surface and underground, as well as in public and private buildings, including installation of user terminal equipment;
- install telecommunication networks on land in the public or private domain of the MSAR or other legal persons governed by public law; and
- access private lands and buildings, with the consent of their owners, as well as public places, through agents and vehicles, provided that they are properly identified, whenever the nature of the work so requires.

It should be noted that the execution of the civil construction works or of the alteration of the installations inherent to the exercise of the rights indicated above requires prior opinion on the issuance of licences under the responsibility of the Department of Soil, Public Works and Transport Services to be issued by DSRT.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The Administrative Regulation no. 41/2004 establishes the regime for interconnection of public telecommunications networks, which shall be made in an environment of equal conditions of competition, in order to ensure that it is carried out in a timely and reasonable manner. The Administrative Regulation no. 41/2004 establishes the following essential principles and requirements of interconnection:

- inviolability and confidentiality of communications;
- non-discrimination in the connection offer;
- interoperability of telecommunications services;
- integrity of telecommunications networks, as well as installations and equipment connected to interconnection; and
- accounting separation for legally provided interconnection entities.

It is the responsibility of the Government, at the request of either party in a dispute, to resolve the conflicts arising from the interconnection operation. The intervention of the Government must be requested within a maximum of 30 days from the date of verification of the event that gave rise to the conflict, and the decision of the Government is given within a maximum period of sixty days from the date of the full investigation of the case with the elements necessary for its analysis.

The decision of the Government can be appealed, under the terms of the general law.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The Administrative Regulation no. 41/2004 provides that the operators of basic telecommunications network shall draw up an interconnection reference document which shall include at least the following elements:

1) Definitions of concepts used.
2) Principles of interconnection.
3) Description of the interconnection service.
4) Technical standards.
5) Interconnection points.
6) Quality of service standards.
7) Interconnection prices.
8) Billing processes and conditions of payment.
9) Management, operation, maintenance and repair.
10) Confidentiality of communications.
11) Suspension and termination of service.
12) Conflict Resolution.
13) Applicable legislation.

The interconnection reference documents and their amendments are subject to Government approval, after which the tendering operator must ensure that they are properly advertised.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

In accordance with the Administrative Regulation no. 41/2004, interconnection prices should be set in a transparent, economically viable and cost-oriented manner, and all components of interconnection prices should be appropriately disaggregated so that operators are not burdened with infrastructure, equipment or service charges that are not necessary for the required interconnection.

Furthermore, the law determines that the Government shall periodically assess interconnection prices, taking into account the public interest, market evolution, cost of capital and cost developments as a result of technological development. For this purpose, the Government may request interconnection providers to justify their prices and show that they are calculated based on actual costs of the service, including a reasonable rate of cost of capital, and can determine its cost adjustment, based on separate accounting information.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

As indicated above, the following entities must possess accounting separation:

a) entities who are operators of the basic telecommunications network; and
b) entities who simultaneously provide competing telecommunications services for public use.

Also, without prejudice to the directives of principle issued by the Government, in accordance with actual requirements and in accordance with internationally accepted standards, the separate accounting system for interconnection activity shall include the following elements:

1) the cost model used, including the calculation basis;
2) the identification of all individual components of costs which together constitute the interconnection price, including the cost of capital invested;
3) the method of calculating the cost of capital;

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4) cost objects; and

5) the accounting conventions and principles used.

No specific provisions exist regarding functional or legal separation.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Without prejudice to the legislation described above, no specific regulation exists regarding high-speed broadband networks.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Under the Administrative Regulation no. 7/2002, licences shall lay down the terms and conditions for, *inter alia*, supply conditions, including non-discriminatory pricing systems.

Also, the same regulation determines that the prices of services provided by the licensed entities are approved by the Government, which may determine their total or partial liberalisation, by order of the Chief Executive. The prices should be fixed as close as possible to the cost of services rendered, and the Government may set ceilings, taking into account the need for a commercial income on the investment made.

Therefore, prices are not imposed but are subject to the control of the Government.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

There is no specific stipulation regarding the provision of electronic communications services to consumers such as universal service.

Law no. 14/2001 determines that the telecommunication policy aims to ensure to the whole population and to economic and social activities the access to telecommunications, at reasonable rates and prices, in a non-discriminatory manner and in conditions of quality and efficiency that correspond to its needs and ensure the existence and availability of the universal telecommunications service.

In accordance to said law, the set of obligations inherent to the universal service of telecommunications shall be determined in an evolutionary way, in accordance with technological progress, market development and changes in demand by users, taking into account the requirements of harmonious and balanced economic and social development.

As regards the operation of public telecommunications networks and telecommunications services for public use, the Law provides that the licence titles for the exercise of the above activities define the terms and conditions under which they are authorised to carry out the activity, namely the obligations of universal service. Hence, the respective licence may stipulate stricter rules/objectives regarding universal service.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identifying codes are allocated under the Administrative Regulation no. 15/2002 – this regulation further stipulates that the numbering resources are part of the public domain and their use is subject to prior assignment, in accordance with this Administrative Regulation and the Numbering Plan, approved by Dispatch of the Secretary for Transport and Public Works no. 43/2016, of October 17 (http://bo.io.gov.mo/bo/i/2016/42/despstop.asp#43).

2.17 Are there any special rules which govern the use of telephone numbers?

The management and allocation of numbering resources shall comply with the principles of non-discrimination, fairness, transparency and effective and efficient use and shall not prejudice the freedom of choice of the operator or provider or impede number portability, the functionality through which users who request it can keep their number or numbers, regardless of the operator or service provider offering the respective service.

With regard to the Numbering Plan, it must have numbering capacity and management flexibility in order to ensure the development of telecommunications, and be capable of adapting to new technologies and services.

2.18 Are there any obligations requiring number portability?

As stated above, Administrative Regulation no. 15/2002 determines that the management and allocation of numbering resources shall not prejudice the freedom of choice of the operator or provider or impede number portability.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

In accordance with Law no. 8/89/M, the radio spectrum belongs to the public domain of the MSAR and the Chief Executive may allocate other frequency bands of the broadcasting service already available or which, as a consequence of technological development, have been added to the International Frequency Allocation Plan.

Furthermore, Decree-Law no. 18/83/M, of March 12, determines that the Chief Executive is responsible for all activities related to the management, general administration and policy of radio communications, and that such administration shall be exercised through the Macau Post Office, which shall be responsible for:

a) management of the radio electric spectrum;

b) support to the Government in the coordination, tutelage and planning of the radio communications sector; and

c) representation of said sector.

In the area of management of the radio spectrum management, the Macau Post Office is responsible for:

i. the assignment of frequencies;

ii. the setting and monitoring of conditions of use;

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iii. the supervision of radio electric installations, with the exception of those related to the Security Forces;

iv. the control and monitoring of radio interference; and

v. the application of sanctions, when applicable.

As previously indicated, the Telecommunications Management Department is the sub-unit with the Macau Post Office which is responsible for supporting the definition of telecommunications policy, including telecommunications and broadcasting services, and for the management and monitoring of its activities, with the exception of broadcasting content. The Telecommunications Management Department is responsible, *inter alia*, for standardising and managing telecommunication and broadcasting activities, in particular to monitor compliance with the provisions of legislation, regulations, licences, contracts or regulatory directives applicable to network operators and service providers, with the exception of broadcasting content.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

As indicated above, Law no. 8/89/M determines that the television broadcast activity is subject to a concession contract and may be granted to any legal person that is incorporated as such, has its head office in Macau, whose purpose is the exercise of the activity to be granted and offers guarantees of suitability, technical qualification and financial capacity. Similarly, the activity of radio broadcasting is subject to a permit and may be exercised by any legal person having its head office in Macau and offers guarantees of suitability, technical qualification and financial standing.

The installation and operation of television and sound broadcasting equipment is subject to compliance with the legal provisions on radio communications in force in the MSAR (namely, decree no. 185/93/M, of June 28, and Decree-Law no. 48/86/M, of November 3) and must be requested from the Macau Post Office.

Furthermore, as was already referred to above, the Macau Post Office is responsible for the assignment of frequencies and the setting and monitoring of conditions of use (among others). No specific procedures are presented to allocate spectrum between candidates.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

As a rule, according to Decree-Law no. 18/83 / M, no person in the MSAR or on board a ship or aircraft subject to its laws may hold in its possession transmitting, receiving or radio communication transmitting equipment, nor to establish or use a station or a radio communication network, without prior governmental authorisation.

However, Decree-Law exempts radio equipment from governmental authorisation, namely the radio communications equipment used by the Security Forces and the Judicial Police which are needed for the collective needs of security and public order, as well as the following equipment:

a) equipment of reduced power and small scope, included in categories to be fixed by governmental order; and

b) receivers of radio and television broadcasting services.

Regarding the activity of television and radio broadcasting, Law no. 8/89/M stipulates that the granting of concessions (for television broadcasting) and the award of permits (for radio broadcasting) shall be preceded by a call for tenders, except where duly motivated and reasoned reasons advise direct adjustment.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The fees and fines applicable to radio services were approved by Administrative Regulation no. 16/2010, of July 12 (http://bo.io.gov.mo/bo/i/2010/28/regadm16.asp), which sets out the "General Table of Fees and Fines Applicable to Radio Services".

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Under Law no. 8/89/M, for both television and radio broadcasting concessions/permits, the transmission, by any title, of rights or social participation in the broadcasting companies, is dependent on previous authorisation by the Chief Executive.

Furthermore, any such transmission, by any title, of rights or social participation against the provisions of this law is null and void.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Under Law no. 8/89/M, the conveyance of the concession is allowed as long as it is duly substantiated and authorised by the grantor. Regarding radio broadcast permits, the same may be transmitted, free of charge or not, together with the broadcasting station concerned to the licensed wave type, after three years of its attribution or renewal. However, the transmission is subject to prior authorisation by the Chief Executive.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Law no. 16/92/M, of September 28 (http://bo.io.gov.mo/bo/i/92/39/lei16.asp), establishes and regulates the inviolability and protection of the secrecy of postal communications, telecommunications and other private communications. It also prohibits any interference by public authorities in postal communications and telecommunications, except in cases provided for in this law and other applicable legislation.

Under the terms of Law no. 16/92/M, the duty of secrecy in communications covers the secrecy of postal communications (which includes a prohibition on reading any correspondence, even if not contained in a closed envelope, and on opening closed correspondence) and the secrecy of telecommunication (which consists in the prohibition of learning the content of any message or information, except to the extent that the execution of the service so requires).

The secrecy of postal communications and telecommunications also covers the prohibition on disclosure to third parties of the content of any message or information which has been duly or unduly known and of the relationship between senders and recipients and their addresses.

Furthermore, the Chief Executive Dispatch no. 186/2013, of June 24, created the Public Registered Postal E-mail Service and approved the respective regulation – said Service consists of the acceptance by the Public Operator of electronic messages sent by computer means by an authenticated sender in order to be delivered,

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also by computer means, to the recipient or authenticated recipients, indicated by the sender.

Also, Law no. 11/2009, of July 6 (http://bo.io.gov.mo/bo/i/2009/27/lei11.asp), establishes the criminalisation of computer crimes and also determines a regime for collecting evidence in electronic format (including telecommunications).

Finally, the treatment of personal data is regulated by Law no. 8/2005, of August 22 (http://bo.io.gov.mo/bo/i/2005/34/lei08.asp), which establishes the legal regime for the processing and protection of personal data.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

As indicated above, Law no. 16/92/M establishes and regulates the inviolability and protection of the secrecy of said communications. It also prohibits any interference by public authorities in postal communications and telecommunications, except in cases provided for in this law and other applicable legislation.

Also, Administrative Regulation no. 41/2004 establishes the regime of interconnection of public telecommunications networks, which shall be made in an environment of equal conditions of competition, in order to ensure that it is carried out in a timely and reasonable manner, ensuring in particular the inviolability and confidentiality of communications, the non-discrimination in the provision of interconnection, the interoperability of telecommunications services, and the integrity of telecommunications networks, installations and equipment assigned to interconnection.

The Macau Criminal Procedure Code (Law no. 17/96/M, of August 12) stipulates that the seizure of letters, packages, valuables, telegrams or any other correspondence can only be made, under penalty of nullity, when authorised or ordered by judicial order and provided there are reasonable grounds to believe that:

a) the correspondence was issued by the suspect or addressed to him, even if under a different name or through a different person;

b) a crime punishable by a prison sentence of a maximum limit of more than three years is at stake; and

c) the inquiry will be of great interest for the discovery of the truth or for the proof.

Also, the judge who authorised or ordered the proceedings is the first person to take note of the content of the seized correspondence; if he/she considers it relevant to the proof, it will be attached to the procedure; if not, it shall be returned to the relevant person and it cannot be used as a means of proof, also the judge is bound by a duty of secrecy in relation to what he has learned and is not considered to be of interest for evidentiary purposes.

Further, in the course of the investigation, it is the sole responsibility of the investigative judge to order or authorise seizures of correspondence (as described above), or interceptions or recordings of telephone conversations or communications, in accordance with the Criminal Procedure Code, and any other acts the law expressly subjects to an order or authorisation of the investigative judge.

Therefore, only a judge may access private communications within the scope of a criminal procedure.

However, in what pertains to the use of telecommunications, the Commission Against Corruption, an independent body that only responds to the Chief Executive (created by Law no. 10/2000, of August 14 (http://bo.io.gov.mo/bo/i/2000/33/lei10.asp)) whose mission is to promote actions to prevent and investigate crimes of corruption and related crimes of fraud within the framework of public and private sector activities, as well as to serve as Ombudsman, promoting the defence of rights, freedoms, guarantees and legitimate interests of persons, in accordance with their attributions, shall have access, in any form, including computerised form, to the information contained in the files of the Administration and of public and autonomous entities, necessary for the performance of its duties, and for the purpose of criminal investigations, to information contained in the files of the operators of telecommunications services regarding the identity of the owners of telecommunications means.

Finally, Law no. 11/2009, of July 6 (http://bo.io.gov.mo/bo/i/2009/27/lei11.asp), establishes the criminalisation of computer crimes and also determines a regime for collecting evidence in electronic format (including telecommunications). Under this legislation, the access to private communications shall follow the rules of the Criminal Procedure Code (namely regarding the access to private correspondence).

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

No such rules exist – as per the Criminal Procedure Code, the interception or recording of telephone conversations or communications can only be ordered or authorised, by order of the judge, if there is reason to believe that such diligence will be of great interest for the discovery of the truth or for the proof of crimes:

a) punishable by imprisonment with a maximum limit of more than three years;

b) relating to trafficking in narcotic drugs;

c) in relation to prohibited weapons, to explosive devices or materials or similar;

d) of smuggling; or

e) of injuries, threats, coercion and intrusion in private life, when committed by telephone.

4.4 How does the state intercept communications for a particular individual?

Without prejudice to the stipulations regarding criminal procedures and the powers of the Commission Against Corruption, no such terms exist.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Without prejudice to the Public Registered Postal E-mail Service (regarding the encryption of electronic messages by such entity), no specific rules exist regarding encryption.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

No minimum deadline for retaining data exists.

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5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Regarding the press, as indicated above, the main legislation is the Law no. 7/90/M, which regulates the exercise of freedom of the press, the right to information and the activity of journalistic, editorial and news organisations.

The law also regulates the organisation of publications and press registration, the exercise of the right of reply, denial, rectification, and the right to clarification, as well as the regime regarding liability for unlawful acts not provided for in the common criminal legislation. As stated above, the Decree no. 11/91/M, of January 28 (http://bo.io.gov.mo/bo/i/91/04/port11.asp) regulates the way in which the press register is processed, through its own media, with the Media Office.

Without prejudice to the stipulations of the Decree-Law no. 43/99/M, of August 16 (http://bo.io.gov.mo/bo/i/99/33/declei43.asp), regarding the regime of copyright and related rights, no specific stipulations regarding the distribution of audio-visual media exist in Macau.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Without prejudice to specific stipulations regarding the journalistic activity and journalistic content under the Law no. 7/90/M, no differences exist between content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms.

As for advertisement, Law no. 7/89/M, of September 4 (http://bo.io.gov.mo/bo/i/89/36/lei07.asp), establishes the legal regime of advertising – however, it does not discriminate between the platforms being used for such advertising and, therefore, is applicable regardless of the medium.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

This is not applicable.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

This is not applicable.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

We have no knowledge of any decision on this matter.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Under Administrative Regulation no. 24/2002, the provider of Internet services shall, *inter alia*, take the necessary measures to ensure the inviolability and confidentiality of communications of the services provided, as well as for the protection of personal data and privacy, ensure the integrity and inviolability of computer networks and systems, and observe the laws in force in the MSAR, as well as the orders, injunctions, commands, directives, recommendations and instructions that, under the legal terms, are issued by the competent authorities.

Similarly, Law no. 14/2001 determines that the users of telecommunications services are guaranteed, in particular, the right to inviolability and the confidentiality of their communications, in accordance with the law.

Therefore, if there is an injunction or court order in a given procedure regarding the infringement of rights, telecommunications operators must provide the requested assistance.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Law no. 14/2001 determines that operators of the public telecommunications service must guarantee the use of their networks by all telecommunication operators on an equal footing, by allowing the interconnection of telecommunications networks used by other operators, in order to guarantee access and communications among users of the services provided by different operators.

It further prohibits telecommunication operators from engaging in any practice which distorts a level playing field or which leads to an abuse of a dominant position, in particular:

a) discriminatory practices in the context of relations with other telecommunication operators and with the general public;

b) agreements or concerted practices between telecommunications operators or associations of undertakings, irrespective of their form, which have the effect of distorting, restricting or impeding competition; and

c) all forms of cross-subsidisation or other practices which undermine competition or freedom of choice for users, such as unfair customer attraction.

Also, as indicated above, the Administrative Regulation no. 41/2004 establishes the regime of interconnection of public telecommunications networks, which shall be made in an environment of equal conditions of competition, ensuring (*inter alia*) the non-discrimination in the provision of interconnection.

Finally, the Administrative Regulation no. 41/2011 stipulates that the licence for the installation and operation of fixed public telecommunications networks may be suspended by order of the Chief Executive when there are acts that distort the conditions of competition or that lead to an abuse of a dominant position.

In any event, regarding this particular subject, please note that the prices of the services to be provided to the users by the entities licensed are approved by dispatch of the Secretary for Transport and Public Works and, although the total or partial liberalisation of the prices referred to in the previous number can be determined by an order of the Chief Executive, Administrative Regulation no.

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41/2011 stipulates that the prices referred to above must be set as close as possible to the cost of services, and maximum and/or minimum limits may be set, taking into account commercial income and free competition.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Without prejudice to the competencies of the Telecommunications Management Department (as indicated above), no specific regulation exists regarding such matters.

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Rato, Ling, Lei & Cortés – Advogados is a Macau SAR based law firm with more than 25 years' experience of legal practice in Macau. Services regularly provided by the firm include issuing legal opinions and advising on Macau Law, helping international companies to start their businesses in Macau and assisting in the reorganisation of economic groups with connections to Macau.

In 2016, Rato, Ling, Lei & Cortés partnered with Zhong Yin Law Firm, in People's Republic of China, and Fongs, in Hong Kong, to open a new office in Hengqin Island, Zhuhai, PRC – ZLF Law Firm. This is the first law office that unites firms from the two Special Administrative Regions and Mainland China.

It has also recently opened an office in Lisbon.

The academic and professional background, the update and specialisation, together with the experience of the lawyers of Rato, Ling, Lei & Cortés, are the key to answering the increasing demand of the firm's worldwide Clients.

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Malaysia

Khairul Fazli Abdul Kadir

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(a) Telecoms

The telecommunications sector in Malaysia is led by key players, Celcom, Maxis Bhd, and Digi.com with collective revenue at approximately RM 20 million in 2016 with 29.1%, 40.8% and 30.1% of the market share respectively. Furthermore, due to the recent Government's allocation of spectrum, it is notable that a small player like U Mobile Sdn Bhd has been gaining a market share of more than 10%.

(b) Audio-Visual Media Distribution

Malaysia direct broadcast satellite (DBS) Pay TV service provider, Astro Malaysia Holding Berhad ("ASTRO") is one of the major providers in Malaysia with a reported 54% share of viewership and a total revenue of RM5,475 million in 2016. ASTRO has also collaborated with the Government of Malaysia to offer free satellite television called NJOI that offers free radio and TV channels.

Prime Minister of Malaysia, Datuk Seri Najib Razak has recently in June 2017 launched the digital terrestrial television which officially marks the migration of Malaysia TV broadcasting from analogue to TV broadcast. Branded as MyFreeview, it has been recently launched to enable users to watch content at zero monthly fees with sharper transmission and access to major favourite local channels.

(c) Internet

The internet market is competitive and varies by the type of connection, ranging from digital subscriber line to fibre-optics and wireless. Telekom Malaysia Berhad is in the lead with its various high speed broadband services, the main packages being Streamyx and UNIFI. Four major players in the fibre broadband industry are: TM UniFi; Time Fibre; MaxisONE Home; and Celcom Home Broadband. Celcom Axiata Bhd, Digi.com, Maxis Berhad and U Mobile Sdn Bhd are in the lead for mobile broadband services in Malaysia.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) For telecoms the most important legislation are the following:

- Communications and Multimedia Act 1998.

The Communications and Multimedia Act 1998 regulates the Malaysian telecommunications industry, replacing the repealed Telecommunications Act 1950 and the Broadcasting Act 1988 to merge both communication and multimedia industries, and regulates both the industries under a single regime.

- Communications and Multimedia Commission Act 1998.
- Betting Act 1953.
- Companies Act 1965.
- Computer Crimes Act 1997.
- Consumer Protection Act 1999.
- Consumer Protection (Electronic Trade Transactions) Regulation 2012.
- Capital Markets and Services Act 2007.
- Copyright Act 1987.
- Common Gaming Houses Act 1953.
- Defamation Act 1958.
- Digital Signature Act 1997.
- Direct Sales Act 1993.
- Electronic Commerce Act 2006.
- Electronic Government Activities Act 2007.
- Film Censorship Act 2002.
- Financial Services Act 2013.
- Malaysian Communications and Multimedia Content Code.
- Personal Data Protection Act 2010.
- Penal Code.
- Pool Betting Act 1967.
- Sedition Act 1948.

(b) Internet

Some of the legislations governing Telecoms above are also applicable to the Internet.

(c) Audio-Visual Media Distribution

Some of the legislations governing Telecoms above are also applicable to the Audio-Visual Media Distribution.

In addition, the followings legislation is also applicable:

- Malaysian Code of Advertising Practice.
- Printing and Presses and Publication Act 1984.

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1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms and internet

- Ministry of Communications and Multimedia Malaysia.
- Ministry of Domestic Trade, Co-operatives and Consumerism (KPDNKK).
- Minister for Home Affairs.
- Minister of Information, Communications and Culture.
- Malaysian Communications and Multimedia Commission.
- Communication and Multimedia Content Forum.
- Companies Commission of Malaysia (SSM).
- Department of Personal Data Protection.
- Royal Malaysia Police (PDRM).
- Securities Commission Malaysia (SC).

(b) Audio-visual media distribution

Some of the above Government ministries, regulators and agencies also have a role in regulating Audio-visual media distribution in addition to the following:

- Advertising Standards Advisory.
- Film Censorship Board Malaysia.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(a) Telecoms and internet

The Government of Malaysia has fully liberalised the service sector in order to attract more foreign investment. However, foreign ownership restriction may remain in place by the relevant sector regulator such as the Malaysian Communication and Multimedia Commission under the Communications and Multimedia Act 1998 due to policy reasons.

In April 2012, Malaysia has begun allowing 100% foreign equity participation in application service providers. A limit of 70% foreign participation remains in effect for network facilities providers and network service providers' licences.

There are no rules restricting foreign ownership or investment in the internet industry.

(b) Audio-visual Media Distribution

Certain restrictions by Malaysian Communication and Multimedia Commission as provided under the Communications and Multimedia Act 1998 would be applicable to Audio-visual Media Distribution.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Malaysia has been a member of the World Trade Organisation since 1995. It has made substantial commitments under the GATS in relation to the telecommunication market. Malaysia has also adopted some of the principles noted in the telecoms reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The Communications and Multimedia Act 1998 is the main legislation which provides for and to regulate the converging communications and multimedia industries and for any other incidental matters relating thereto.

Malaysian Communications and Multimedia Commission Act 1998 provide for the establishment of the Malaysian Communications and Multimedia Commission with powers to supervise and regulate the communications and multimedia activities in Malaysia and to enforce the communication and multimedia laws of Malaysia and other related matters.

The Malaysian Communications and Multimedia Commission set forth 10 national policy objectives as follows:

- to establish Malaysia as a major global centre and hub for communications and multimedia information and content services;
- to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;
- to grow and nurture local information resources and cultural representations that facilitate the national identity and global diversity;
- to regulate for the long-term benefit of the end-user;
- to promote a high level of consumer confidence in service delivery from the industry;
- to ensure an equitable provision of affordable services over ubiquitous national infrastructure;
- to create a robust application environment for end users;
- to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;
- to promote the development of capabilities and skill within Malaysia's convergence industries; and
- to ensure information security, network reliability and integrity.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

Competition Law is governed under the Malaysian Competition Act 2010 which has been in force since 1 January 2012 to prohibit anti-competitive agreements and the abuse of dominant positions in the market. The Competition Commission Act 2010 was passed to provide for the establishment of the Malaysian Competition Commission, which primary function is to regulate and enforce the Competition Act 2010.

The Competition Act 2010 does not apply to any commercial activity regulated under the Communications and Multimedia Act 1998. The Communications and Multimedia Act 1998 which is regulated by the Malaysian Communications and Multimedia Commission has its own competition regulation which prohibits anti-competitive conduct by the licensees licensed under the Communications and Multimedia Act 1998.

The Malaysian Communications and Multimedia Commission is not independent from the Government as it is headed by the Ministry of Communications and Multimedia.

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2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The Communications and Multimedia Act 1998 provides that the Appeal Tribunal may review any matter on appeal, from a decision or direction of the Malaysian Communications and Multimedia Commission but not from a determination by the Malaysian Communications and Multimedia Commission. Any decision by the Appeal Tribunal is final and binding on the parties to the appeal and is not subject to further appeal.

Further, a person affected by a decision or other action of the Minister or Malaysian Communications and Multimedia Commission may apply to the court for a judicial review of such decision or other action. A person shall not apply to the court for judicial review unless that person has first exhausted all other remedies provided under the Communications and Multimedia Act 1998.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The following activities require a licence under the Communications and Multimedia Act 1998:

a) Network Facilities Providers – owners or providers of network facilities infrastructure such as cables, towers, satellite earth stations, broadband fibre-optic cables, telecommunication lines and many more.

b) Network Service Providers – owner or licensee (using network facilities owned by another licensee) of network service provide the basic connectivity and bandwidth to support a variety of applications and enable connectivity or transport between different networks.

c) Applications Service Providers – provide a particular functionality or capability service which is generally a retail service, such as voice service, data services, Internet access and electronic commerce.

d) Content Application Service Providers – provide content through application services such as television and radio broadcast services.

There are two types of licences that the Minister may grant:

a) Individual Licence – licence for a specified person to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject.

b) Class Licence – licence for any or all persons to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject.

By virtue of Communications and Multimedia (Licensing) (Exemption) Order 2000, a person who provides any Internet content application services is exempt from the requirement of a licence.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

a) Individual Licence

- Any person applying for an individual licence is required to submit a duly completed application form, other information or documents required under the Communications and Multimedia Act 1998 and Regulation 7 of the Communications and Multimedia (Licensing) Regulations 2000 and payment of the prescribed fees.
- The following conditions apply generally to an individual licence under the Communications and Multimedia Act 1998:
  - (i) The licensee shall be a company that is incorporated in Malaysia.
  - (ii) The shareholding of the company shall comply with relevant Malaysian foreign investment restrictions.
  - (iii) The licensee shall notify the Minister of any changes on shareholdings which are required to be notified to the relevant authority.
  - (iv) The licensee shall notify the Minister of any joint ventures with other licensees into which the licensee enters.
  - (v) The licensee shall comply with the provisions of the Communications and Multimedia Act 1998.
  - (vi) The licensee shall comply with the provisions of any subsidiary legislation made, or other instruments, guidelines or regulatory policies issued, under the Communications and Multimedia Act 1998.
  - (vii) The licensee shall comply with the numbering and electronic addressing plan issued under the Communications and Multimedia Act 1998.
  - (viii) The licensee shall comply with the spectrum plan issued under the Communications and Multimedia Act 1998.
  - (ix) The licensee shall comply with any consumer codes registered under this Act which are relevant to the activities of the licensee.
  - (x) The licensee shall indemnify the Minister and the Commission against any claims or proceedings arising from any breaches or failings on the part of the licensee.
- The following persons or class of persons shall be ineligible to apply for an individual licence:
  - (i) a foreign company as defined under the Companies Act 2016;
  - (ii) an individual or a sole proprietorship;
  - (iii) a partnership; and
  - (iv) such other persons or classes of persons as may be decided by the Minister from time to time.

b) Class Licences

- Application for class licence should be accompanied by a duly completed registration notice, other information or documents required under the Communications and Multimedia Act 1998 and payment of the prescribed fee.
- The following conditions apply generally to class licence under the Communications and Multimedia Act 1998:
  - (i) The class licence replaces any other licence the Minister may grant and will be the sole licence held by the licensee for the application services authorised under the licence.
  - (ii) The licensee shall comply with the provisions of the Communications and Multimedia Act 1998.
  - (iii) The licensee shall comply with the provisions of any subsidiary legislation made, or other instruments, guidelines or regulatory policies issued, under the Communications and Multimedia Act 1998.
  - (iv) The licensee shall comply with the numbering and electronic addressing plan issued under the Communications and Multimedia Act 1998.
  - (v) The licensee shall comply with any consumer codes registered under this Act which are relevant to the activities of the licensee.
  - (vi) The licensee shall indemnify the Minister and the Commission against any claims or proceedings arising from any breaches or failings on the part of the licensee.

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(vii) Individual licences are also subject to other standard conditions and matters as the Minister may declare or that any subsidiary legislation under the Communications and Multimedia Act 1998 may provide.

- The following persons or classes of persons shall be ineligible to be registered as a class licensee:
  (i) a foreign individual who is not a permanent resident; and
  (ii) a foreign company as defined under the Companies Act 2016.

Nevertheless, the Minister may permit either of the above to apply to be registered as a class licensee for good cause or as the public interest may enquire.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The following require individual licences:

a) Network Facilities Provider:
- earth stations;
- fixed links and cables;
- radio-communications transmitters and links;
- satellite hubs;
- satellite control station;
- space station;
- submarine cable landing centre;
- towers, poles, ducts and pits used in conjunction with other network facilities; or
- such other network facilities which are not exempt under the Communications and Multimedia Act 1998 or not subject to a class licence under Part IV of the Licensing Regulations 2000 or not listed in this sub-paragraph.

b) Network Service Provider:
- bandwidth services;
- broadcasting distribution services;
- cellular mobile services;
- access applications service;
- space services;
- switching services;
- gateway services; or
- such other network services which are not exempt under the Communications and Multimedia Act 1998 or not subject to a class licence under Part IV of the Licensing Regulations 2000 or not listed in this subparagraph.

An applicant who wishes to transfer its individual licence(s) will have to submit the following to the Malaysian Communications and Multimedia Commission:

a) a formal letter that provides the details of the transfer together with an application fee of RM5,000,00; and

b) such additional information or documents as may be requested by the Malaysian Communications and Multimedia Commission to be submitted within a stipulated timeline. Failure to submit within the stipulated timeline given shall result in the application being withdrawn without affecting the right of the applicant to make a fresh application.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The Communications and Multimedia Act 1998 provides that network facilities providers may enter on and inspect the land and do anything on the land that is necessary or desirable for that purpose, including making surveys, taking levels, sinking bores, taking samples, digging pits and examining the soil, for the purposes of determining whether any land is suitable for his purpose of installing or obtaining access to the network facilities.

Further, the Communications and Multimedia Act 1998 provides that the network facilities providers may also carry out the installation of network facilities, which may require the approval of the relevant authorities, for purposes connected with the provision of network services as follows:

a) the provider is authorised to do so by a network facilities installation permit issued by the Commission as prescribed under the Communications and Multimedia Act 1998;

b) the network facilities are low-impact network facilities;

c) the network facilities are temporary network facilities for use by, or on behalf of, the Ministry of Defence for defence purposes; or

d) the installation is carried out for the sole purpose of connecting a building or structure, or a line that forms part of a network facility.

Upon authorisation, network facilities providers may enter and occupy any land, and on, over or under the land do anything necessary or desirable for the purposes in connection with the carrying out of the activities which includes the followings:

a) constructing, erecting and placing any post or network facility;

b) felling and lopping trees and clearing and removing other vegetation and undergrowth;

c) making cuttings and excavations;

d) restoring the surface of the land and, for that purpose, removing and disposing of soil, vegetation and other material;

e) erecting temporary workshops and sheds and other temporary buildings; and

f) levelling the surface of the land and making roads.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

An access regime has been established under the Communications and Multimedia Act 1998 to enable providers to gain access to necessary facilities and service on reasonable terms and conditions.

Network facilities providers and network service providers shall provide access to their network facilities or network services listed in the access list to any other network facilities providers, network service providers, applications service providers or content applications service providers, subject to such exemptions as may be determined by the Minister by order published in the Gazette.

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An access list has been established under the Communications and Multimedia Act 1998 where it provides that the Malaysian Communications and Multimedia Commission will determine the list of facilities and services that includes network facilities, network services and other facilities and/or services which facilitate the provision of network services or application services including content application services.

To date, the Malaysian Communications and Multimedia Commission has provided for the Commission Determination on Access List No. 1 of 2015 as varied by the Determination No. of 2009 (Variation to Commission Determination on Access List (Determination No. 1 of 2005)) which sets out the type of facilities and/or services subject to the access obligation under the Communications and Multimedia Act 1998.

The Commission Determination on the Mandatory Standard on Access List provides that the access regime is only applicable to facilities and services in the access list. However, the Malaysian Communications and Multimedia Commission encourages all operators to treat the provisions in the Commission Determination on the Mandatory Standard on Access List, where relevant, as a guideline for any other wholesale access arrangements that may be entered into in respect of facilities and services which are not included in the access list.

A dispute between parties in respect of the above under the Communications and Multimedia Act 1998 shall first be attempted to be resolved by negotiation between the parties. The parties may seek resolution of the dispute by the Malaysian Communications and Multimedia Commission (subject to express provision of the Communications and Multimedia Act 1998) as follows:

a) if the parties to the dispute cannot or otherwise fail to reach an agreement and no relevant undertaking has been registered; or

b) if no one of the parties to the dispute does not wish to adopt the conditions of the undertaking.

The Malaysian Communications and Multimedia Commission will convene to decide the dispute if it satisfies the following:

a) an agreement will not be reached, or will not be reached within reasonable time;

b) the notification of the dispute is not trivial, frivolous or vexing; and

c) the resolution of the dispute would promote the objects of the Communications and Multimedia Act 1998.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Each access provider or operator (who owns or provides network facilities or network services) shall prepare and maintain a Reference Access Offer Agreement for each facility and/or service listed in the access list which such access provider provides to itself or third parties. The Reference Access Offer Agreement shall, among others, be consistent with the Communications and Multimedia Act 1998, the Commission Determination on the Mandatory Standard on Access and any applicable decision or determination of the Malaysian Communications and Multimedia Commission be made available on the access provider's publicly accessible website as soon as the Reference Access Offer Agreement is finalised by the access provider.

The access provider or operator must also comply with the disclosure, negotiation, content and service obligation provided under the Commission Determination on the Mandatory Standard on Access.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The Malaysian Communications and Multimedia Commission has issued the Commission Determination on the Mandatory Standard on Access Pricing, Determination No. 1 of 2012 varied by the Variation to Commission Determination on the Mandatory Standard Access Pricing (Determination No. 1 of 2012), Determination No. 4 of 2015 which fixed the maximum prices in respect of the following facilities and services:

a) Fixed Network Origination Service.

b) Fixed Network Termination Service.

c) Mobile Origination Service.

d) Mobile Network Termination Service.

e) Interconnect Link Service.

f) Wholesale Local Leased Circuit Service.

g) Domestic Connectivity to International Services.

h) Network Co-Location Service.

i) Transmission Service.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

All operators are subjected to the requirement of accounting separation. The Malaysian Communications and Multimedia Commission has adopted a two-level approach under the Guidelines on Implementation of Accounting Separation in Malaysia 2016 as follows:

a) detailed reporting will apply to operators whose revenue and total assets in Malaysia both exceed RM3 billion; and

b) less detailed reporting will apply to operators whose revenue and total assets in Malaysia fall below RM3 billion.

There is no requirement of functional or legal separation to date.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

High-speed broadband networks are subjected to the access list as well. The Ministry of Energy, Water and Communication has further issued a Ministerial Direction on the High-Speed Broadband and Access List, Direction No. 1 of 2008 under the Communications and Multimedia Act 1998, where the Malaysian Communications and Multimedia Commission is directed to give effect to the agreement entered between the Government and Telekom Malaysia Berhad ("Telekom") on the deployment of a high-speed broadband network in order to create an environment where high-speed broadband networks can be deployed efficiently by Telekom and to promote effective competition in the communications and multimedia industry in an orderly fashion.

Further, the Communications and Multimedia Act 1998 provides that network facilities providers or a public utility shall provide network facilities providers with non-discriminatory access to any post, network facilities or right-of-way owned or controlled by him. Nevertheless, network facilities providers or a public utility may

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deny any network facilities providers access to his post, network facilities or right-of-way on a non-discriminatory basis of safety, security, reliability, or difficulty of a technical or engineering nature.

Pursuant to the Government Budget 2008, the Government had an approved tax incentive for broadband service providers and the Malaysian Communications and Multimedia Commission thereafter has introduced the Certification of Tax Incentive for Investment and Purchase of Equipment in 2007 which is applicable for investment made and equipment purchased from 8 September 2007 until 31 December 2010 in the form of 100% investment allowance on capital expenditure incurred by the last mile network facilities providers for broadband infrastructure to provide broadband services.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Retail price of public switched telephone network telephony services, public payphone services, emergency services, operator assistance service, directory assistance service, internet access services and audio-text hosting services were previously regulated under the Communications and Multimedia (Rates) Rules 2002. Nevertheless, the Communications and Multimedia (Rates) Rules 2002 has been revoked by the Communications and Multimedia (Rates) (Revocation) Rules 2016.

The Communications and Multimedia Act 1998 provides that any network facilities providers, network service providers, applications service providers and content applications service providers may set rules in accordance with the market rates and they are also required to publish the rates charged to customers for one or more services.

Nevertheless, the providers mentioned above must ensure that the rates established shall be based on the following principles:

a) rates must be fair and, for similarly situated persons, not unreasonably discriminatory;

b) rates should be oriented toward costs and, in general, cross-subsidies should be eliminated;

c) rates should not contain discounts that unreasonably prejudice the competitive opportunities of other providers;

d) rates should be structured and levels set to attract investment into the communications and multimedia industry; and

e) rates should take account of the regulations and recommendations of the international organisations of which Malaysia is a member.

Notwithstanding the above, the Communications and Multimedia Act 1998 provides that the Minister may intervene freely or frequently in determining and settling the rates for any competitive facilities or services provided by provider for good cause or as the public interest may require on the recommendation of the Malaysian Communications and Multimedia Commission.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

It is one of the objects of the Communications and Multimedia Act 1998, to promote a high level of consumer confidence in service delivery from the industry.

Communications and Multimedia Act 1998 provides that all network facilities providers, network service providers, applications service providers and content applications service providers (except for those who are not required to have individual or class licence) shall deal reasonably with consumers and adequately address consumer complaints.

The Malaysian Communications and Multimedia Commission has issued the General Consumer Code of Practice for the Communications and Multimedia Industry Malaysia in 2003 which binds all licensed service providers as far as their licensed activities are concerned and all non-licensed service providers who are members of the consumer forum established under the Communications and Multimedia Act 1998. The General Consumer Code of Practice for the Communications and Multimedia Industry Malaysia provides model procedures which include reasonably meeting consumer requirements, the handling of customer complaints and disputes, and to provide benchmarks for the communications and multimedia service providers for the benefit of the consumers.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The Communications and Multimedia Act 1998 provides that the Malaysian Communications and Multimedia Commission shall be vested with the control, planning, administration, management and assignment of the numbering and electronic addressing of network services and application services.

Further, the Malaysian Communications and Multimedia Commission has issued a Numbering and Electronic Addressing Plan on 26 June 2006 which set out rules such as the use of different numbers and electronic addresses for different kinds of services and the assignment, transfer, use and portability of assigned numbers and electronic addresses.

2.17 Are there any special rules which govern the use of telephone numbers?

The Malaysian Communications and Multimedia Commission may reserve any unassigned numbers under the Numbering and Electronic Addressing Plan for planning purposes or to realise the value of cherished numbers. This reserved number may only be available for application for assignment if the reserved number designation is removed by the Commission or the application is made pursuant to an invitation by the Commission. Several principles apply in determining cherished numbers such as repeated digits, increasing or decreasing sequences, alternating sequences or repeated pairs.

2.18 Are there any obligations requiring number portability?

The Malaysian Communications and Multimedia Commission has implemented Mobile Number Portability in 2007 so that users are able to switch to a new mobile service provider while retaining their existing mobile number to allow freedom of choice.

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3 Radio Spectrum

3.1 What authority regulates spectrum use?

Malaysian Communications and Multimedia Commission has the overall responsibility for managing spectrum under the Communications and Multimedia Act 1998 including the task of developing a Spectrum Plan in respect of all or any part of the spectrum. Aside from Communications and Multimedia (Spectrum) Regulations 2000, the Malaysian Communications and Multimedia Commission has recently in May 2017 issued the latest Spectrum Plan 2017 which sets out the allocation of frequency bands to various types of services.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The Spectrum Plan 2017 provides that a frequency band may be used for a service that is operating in accordance with spectrum, apparatus and class assignment and specified in the table set out in Part B of Chapter 2 of the Spectrum Plan 2017.

The Communications and Multimedia Act 1998 and the Spectrum Plan 2017 provides for several methods of assignment which includes the following:

(a) Auction – assignment of spectrum assignments and apparatus assignments by auction where the successful applicant is chosen based on who bid the highest price.

(b) Tender – assignment of spectrum assignments and apparatus assignments by tender where applicants must first submit their application in accordance to procedure set out by the Malaysian Communications and Multimedia Commission either based on the evaluation of experience, technical and commercial proposals ('beauty parades') or price proposal.

(c) Fixed Price – assignment of spectrum assignments at fixed price to be determined by the Minister or the Malaysian Communications and Multimedia Commission.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

There is no spectrum usage that is made licence-exempt.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

First Schedule of the Communications and Multimedia (Spectrum) Regulations 2000 list down the fees for spectrum and apparatus assignment which varies depending on the nature of the service and the type of apparatus.

Second Schedule of the Communications and Multimedia (Spectrum) Regulations 2000 list down the application fees which varies depending on the matter which includes spectrum or apparatus assignment or variation of spectrum or apparatus assignment.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Communications and Multimedia (Spectrum) Regulations 2000 provides that the spectrum assignment holder may transfer or otherwise deal with the whole or any part of a spectrum assignment subject to the following:

a) the conditions of the spectrum assignment are as follows:
   (i) absolute prohibition on transfer or otherwise dealing with the assignment;
   (ii) permitted if the assignment is transferred or otherwise dealt with in its entirety;
   (iii) permitted for a geographic area in multiples of the stated geographic unit; or
   (iv) permitted in multiples of the stated spectrum unit;
b) the eligibility requirements applicable when the spectrum assignment was issued;
c) the spectrum assignment not having been originally issued in the public or national interest;
d) the rules made by the Minister under the Communications and Multimedia Act 1998; and
e) such other conditions as the Commission may impose.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

See question 3.5 above.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

There are five (5) main legislations governing 'cybersecurity' in Malaysia, as follows:

(a) Communications and Multimedia Act 1998 – Act 588;
(b) Computer Crimes Act 1997 – Act 563;
(c) Digital Signature Act 1997 – Act 562;
(d) Electronic Commerce Act 2006 – Act 658; and
(e) Personal Data Protection Act 2010 – Act 709.

The Government agencies and units that deal with cybersecurity in Malaysia in terms of monitoring the National e-Security aspect, providing specialised cybersecurity services and identifying possible areas that may be detrimental to national security and public safety includes Cyber Security Malaysia, Malaysia Computer Emergency Response Team ('**MyCERT**'), Cyber999, CyberCSI, National Vulnerability Assessment Centre ('**MyVAC**'), Malaysian ICY Security Evaluation Facilities ('**MySEF**'), Malaysian Common Criteria Evaluation and Certification ('**MyCC**') and Cyber Security Awareness for Everyone ('**CyberSAFE2**').

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

There are seven (7) principal legislations governing the ability of the state to obtain access to private communications in Malaysia, as follows:

(a) Communications and Multimedia Act 1998 – Act 588

- This Act allows the Public Prosecutor to authorise any officer and/or police officer to intercept any communications which he/she considers to be relevant for the purpose of investigation of the related offence. This Act also states that the Minister has the power to compel the relevant service providers and/or licensee(s) to permit for the authorised interception of communications.

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(b) Criminal Procedure Code – Act 593

- This Act allows the Public Prosecutor to authorise any officer and/or police officer to intercept communications should the same be relevant and/or related to the commission of the offence.

(c) Security Offences (Special Measures) Act 2012 – Act 747

- This Act allows the Public Prosecutor to authorise any officer and/or police officer to intercept any communications which are relevant to the commission of the security offence.

(d) Copyright Act 1987 – Act 332

- This Act allows the Public Prosecutor to authorise any relevant officer to intercept any relevant communications if the same is relevant for the purpose of investigation of offence under this Act.

(e) Computer Crimes Act 1997 – Act 563

- This Act allows the Magistrate to grant a warrant to any person and/or police officer to have access over any relevant program and/or data held in any computer and to require the relevant party to provide a reasonable assistance for the authorised officer and/or police officer in accessing such information.

(f) Personal Data Protection Act 2010 – Act 709

- This Act allows the authorised officer to have full access to computerised data whether stored in a computer or otherwise for the purpose of investigation in relation to the commission of offence committed under this Act.

(g) Digital Signature Act 1997 – Act 562

- This Act allows the authorised police officer to have access to all computerised data whether the same is stored within a computer or otherwise.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Section 265 of the Communications and Multimedia Act 1998 states that the Minister may determine that a licensee or class of licensee shall implement the capability to allow authorised interception of communications. The term "communication" is widely defined under **Section 6** of the Communications and Multimedia Act 1998, which would cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communication which fall within the definition of the term "communication".

4.4 How does the state intercept communications for a particular individual?

The manner in which the interception of communication is to be done is provided in the Criminal Procedure Code. This Act provides that the authorised officer and/or police officer can intercept the communications through two (2) ways as follows:

(i) to compel the service provider to intercept and retain a specified communication received and/or transmitted or about to be received and/or transmitted by that communications service provider; and/or

(ii) to enter any relevant premises and subsequently to install any device for the interception and retention of a specified communications in such premises.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are several legislations which allow the state to have an access over the encrypted code. The Communications and Multimedia Act 1998 states that an authorised officer and/or any police officer not below the rank of Inspector shall for the purpose of investigation be provided with any 'access' (which includes encryption code) to enable the same to have full access over a computerised or digitalised data stored in a computer or any other medium. The same provision has also been reflected in the Copyright Act 1987, Personal Data Protection Act 2010 and Digital Signature Act 1997.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Telecoms or internet infrastructure operators may retain data relating to their customers. However, where the data relates to personal data (as defined under the Personal Data Protection Act 2010), the Personal Data Protection Act 2010 which regulates the manner how the personal data is to be processed provides that:

(a) the personal data processed shall not be kept longer than necessary for the fulfilment of the purpose for which they are processed; and

(b) the data user must take all reasonable steps to ensure that all personal data is destroyed or permanently deleted if it is no longer required for the purpose for which it was processed.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Matters relating to audio-visual media which include the distribution of the same by the Content Application Service Providers are regulated by the Communications and Multimedia Act 1998. The Communications and Multimedia Act 1998 requires Content Application Service Providers to obtain a licence prior to provision of services in respect of the same.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

The difference between the two are the requirements needed to register for a licence. For the content delivered through traditional distribution platforms, the Communications and Multimedia Act 1998 requires for the obtainment of a licence i.e. either the individual licence or class licence, by the service providers before the provision of the relevant services.

Whereas for the content delivered through the internet, **Order 6** of the Communications and Multimedia (Licensing) Exemption Order 2000 exempts the party from obtaining any licence from the Malaysian Communications and Multimedia Commission.

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5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

There are two (2) types of licences available for the distribution of audio-visual media by Content Application Service Providers i.e. individual licence and class licence.

The individual licence is applicable to satellite broadcasting, subscription broadcasting, terrestrial free-to-air TV and terrestrial radio broadcasting. The individual licence holder is obliged to pay the prescribed licence fee and must comply with all the terms and conditions imposed on such licence.

The second type of licence is the class licence which is applicable to limited content applications service.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

The Communications and Multimedia Act 1998 allows the individual licence holder to assign the licence subject to the written approval by Minister whose may seek advice from the Malaysian Communications and Multimedia Commission before the grant of such written approval.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

There are several defences provided under the legislations, *inter alia*, as follows:

Section 108 of the Communications and Multimedia Act 1998 provides that a compliance with a mandatory standard by a party shall be a defence for that party against any prosecution, action or proceeding of any nature whether in a court or otherwise regarding a matter dealt with in that mandatory standard.

Section 264 of the Communications and Multimedia Act 1998, provides that any network facilities, network service provider, applications service provider or content applications service provider or any of his employees shall not be liable in any criminal proceedings of any nature for any damage (including punitive damages), loss, cost, or expenditure suffered or to be suffered (whether directly or indirectly) for any act or omission done in good faith in the performance of the duty imposed under **Section 263** of the Communications and Multimedia Act 1998 i.e. duty to prevent the network facilities that he owns or provides or the network services, applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia.

Section 43C of Copyright Act 1987 provides that a service provider shall not be held liable for any infringement of copyrighted works if such infringement occurs due to the following reasons:

- the transmission or routing, or the provision of connections, by the service provider of an electronic copy of the work through its primary network; or
- any transient storage by the service provider of an electronic copy of the work in the course of such transmission, routing or provision of connection.

The above defence can only be applicable provided that:

- a person other than the service provider has initiated the transmission of the copy of the work;
- the transmissions, routing, or the provision of connections is done via an automatic technical process without the selection of the electronic copy of the work by the service provider;
- the service provider does not select the recipient of the electronic copy of the work except as an automatic response to the request of another person; or
- the service provider does not carry any modification (other than technical process), to the content of the copy of the work during its transmission via the primary network.

Section 43D of the Copyright Act 1987 provides that a service provider shall not be held liable for any infringement of the copyrighted work for making of any electronic copy of the work on its primary networks if the same is:

- made available on an originating network;
- it happens through an automatic process;
- it happens in response to an action by a user of its primary network; or
- it happens due to the reason to facilitate the efficient access to the work by a user.

The above defence can only be applicable provided that the service provider has not carried any modification (other than technical process), to the content of the copy of the work during its transmission via a primary network.

Section 43E of the Copyright Act 1987 provides that a service provider shall not be held liable for any infringement of copyrighted work if the infringement happens due to the following reasons:

- the electronic copy of the work is stored at the direction of a user of its primary network; or
- when the service provider refers or links a user to an online location on an originating network, it is apparent that the electronic copy of the work is made available by the use of an information location tool.

The above defence can only be applicable provided that the service provider:

- does not have any actual knowledge that the electronic copy of the work or activity is infringing on the original work;
- does not gain any financial benefit from such infringement; or
- upon the receipt of the notification on the infringement of the work, the service providers has respond to the same i.e., to remove or disable the access over the alleged infringed copyrighted work.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Section 43H of the Copyright Act 1987 provides the owner of the infringed copyright with the right to notify the relevant service provider about the infringement and upon such notification, the service provider shall remove or disable any access relating to the infringed copyrighted works. The owner of the infringed copyright must compensate the service provider for any damages, loss or liability arising from the compliance of the service provider to remove or disable the access to the relevant work in question.

However, such removed or disabled access can be restored back upon the counter-notification made by the person whose work was removed or access was disabled. The service providers has

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to restore the same within ten (10) business days upon the counter-notification except if the owner of the infringed copyright notifies that he/she has filed an action in the court to restrain the counter-issuer's infringing activity.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Section 3(3) of the Communications and Multimedia Act 1998 states that nothing in this Act shall be construed as permitting the censorship of Internet.

This provision, however, needs to be read together with **Sections 211** and **233** of the Communications and Multimedia Act 1998 whereby it is highlighted that the Act regards it to be an offence if the content of the relevant sites is offensive or there is improper use of network facilities or network services to transmit content which is obscene, indecent, false, menacing, offensive or other.

This indirectly set up a minimum guidance and standard for the issue relating to the 'net neutrality' requirements.

Further, the Ministry has a theoretical power to set tariffs for Internet traffic under the Communications and Multimedia Act 1998. Nevertheless, such power has not been used.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Although telecommunications operators and/or internet service providers are not obliged to block access to certain sites or content, **Section 263** of the Communications and Multimedia Act 1998 states that a licensee has the duty to prevent the network facilities that he owns or provides or the network services, applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia and a licensee shall, upon written request by the Malaysian Communications and Multimedia Commission or any other authority, assist the Malaysian Communications and Multimedia Commission or other authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia. In practice, there are several incidents where Malaysian Communications and Multimedia Commission has blocked access to certain sites or contents where the same contravene the Communications and Multimedia Act 1998.

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Azmi & Associates would like to thank Amera binti Mohd Yusof for her input and expertise in the writing of this chapter. Amera joined Messrs. Azmi & Associates as a pupil and will be admitted to the Bar as an advocate and solicitor on 6th October 2017. Some of her assignments include: assisting in trademarks and industrial designs registration; assisting in advising on copyright issues; and assisting in drafting policy and procedures in compliance of Personal Data Protection Act. She is currently a Legal Executive in the Multimedia, Technology and Intellectual Property Practice Group of Messrs. Azmi & Associates.

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Nigeria

Olajumoke Lambo

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The TMT industry in Nigeria has grown over the past two decades but the telecommunications sector has made the most impact. Prior to 1992, the telecommunications sector of Nigeria consisted of a monopoly provider – Nigerian Telecommunications Ltd. ("NITEL"), which was previously owned by the Government. NITEL was the primary provider of both fixed wire and mobile cellular services, and was regulated by the Ministry of Communications. When the government headed by General Olusegun Obasanjo came into power in 1999, it announced that a new National Policy on Telecommunications was to be formulated. The Ministry of Communications published the policy in May 2000 to lay the basis for a new telecommunications sector regulatory regime. Particularly, the policy sought to strengthen the existing regime by increasing certainty and transparency, removing arbitrary restrictions, reducing the largely unfettered discretion of the Nigerian Communications Commission (the "NCC" – Nigeria's telecoms sector regulator), rationalising decision-making and providing a framework within which it would be possible to foster rapid growth in the telecommunications sector and enable substantial improvement in access to telecommunications services. The policy formed the basis for two separate legislative initiatives that led to the promulgation of the Nigerian Communications Act, chapter N97, Laws of the Federation of Nigeria 2004 (the "Communications Act"), which became the root for the liberalisation of the sector, major reforms and licensing.

From the previous era of very little activity/presence, the telecommunications sector has grown into a major industry. While the sector contributed 0.62% to Nigeria's GDP in 2001, the contribution increased to 8.68% in 2014 and data published by the National Bureau of Statistics indicates that despite the serious impact of the recent recession in the Nigerian economy between 2015 and 2017, the sector's contribution in Q1 of 2017 rose further to 9.1%. Since 2001, the subscriber numbers have grown upwards leading to significant increase in tele-density. While there were 41,975,275 active lines in 2007, the number of active lines recorded by the NCC as at July 2017 was 139,144,705 out of an estimated population of over 183 million people. Data from the NCC also shows an increase in the number of internet subscribers from 67,459,892 as of May 2014 to 91,419,943 subscribers as of July 2017. The major telecommunications operators are MTN Nigeria, Globacom, Airtel and 9mobile (previously Etisalat Nigeria).

The media industry on the other hand has made steady progress, even if not at the same pace as the telecoms industry. In a recently published PwC report, however, it was reported that the Nigerian entertainment and media market revenue, which rose to $3.6 billion in 2016 is likely to increase at a compound annual growth rate of 12.2% to $6.4 billion in 2021. In addition to the government-owned Nigerian Television Authority, the other operators include Channels, TV Continental, Multichoice Nigeria, Daar Communications Plc (operators of African Independent Television) and the Silverbird Group.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The "Communications Act" is the principal legislation that governs telecommunications services (including internet services), while the National Broadcasting Commission Act, chapter N11, LFN 2004 (the "NBC Act") regulates the broadcasting sector.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The broadcasting sector is regulated by the National Broadcasting Commission ("NBC"), which is supervised by the Federal Ministry of Information. The NCC is supervised by the Federal Ministry of Communication Technology.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

There are no restrictions on foreign ownership or investment in the Nigerian telecoms sector. Anyone who wishes to provide a telecommunications service in Nigeria must do so through a body corporate and must be licensed by the NCC. A foreign investor can own the entire equity of the local licensee subject to meeting the requirement that a Nigerian company must have a minimum of two shareholders. In addition to obtaining telecommunications licences for each service to be provided, a licensee that has foreign shareholders is also required to obtain foreign investment authorisations required to do business in Nigeria.

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With regard to the broadcasting sector, neither the NBC Act nor the National Broadcasting Code (5th edition) 2012 (the "Code") published by the NBC, specify a minimum threshold for foreign ownership of shares in a broadcasting licensee. The Code, however, provides that to be able to satisfy the main objective of the broadcasting regulation – which is that broadcasting should play a pivotal role in the social, cultural, technological, economic and political lives of the people of Nigeria – the NBC must ensure that any broadcasting entity in Nigeria is substantially owned and operated by Nigerians. The Code requires an applicant company to demonstrate that it is not representing any foreign interests and the NBC is given the sole and absolute discretion to determine whether or not to recommend the grant of a new licence to any applicant by the President or to approve the acquisition of the equity of a broadcasting licensee by a foreigner.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Nigeria became a member of the World Trade Organisation ("WTO") on 1st January 1995, but has not submitted commitments in respect of the WTO Basic Telecommunications Agreement.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The Communications Act requires any person who wishes to operate a communications system/facility or provide a communications service in Nigeria to obtain a licence from the NCC or get an exemption under regulations made by the NCC. A separate licence may be required for each undertaking. Service providers that require radio frequency must apply for the applicable spectrum licence. Fixed, mobile and satellite services are licensed and regulated by the NCC pursuant to the provisions of the Communications Act, the Wireless Telegraphy Act, Chapter W5, LFN 2004 ("WTA"), regulations based on these Acts and the conditions of the licences granted by the NCC.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

Nigeria does not currently have any dedicated competition legislation. However, the Federal Competition and Consumer Protection Bill that seeks to create a level playing field for all businesses across various sectors has been passed by the National Assembly and is expected to be signed into law.

There are, however, some sector-specific regulations on competition. For instance, the Securities and Exchange Commission is required, in determining whether to grant approval for a merger/acquisition, to consider whether such a merger/acquisition could substantially prevent or lessen competition.

Competition and anti-competitive practices in the tele-communications and broadcasting sectors are regulated by the Communications Act and the NBC Act and also in licence conditions and regulations issued by each regulator. The NCC and the NBC, therefore, currently have the exclusive competence to determine all competition issues in the Nigerian telecommunications and broadcasting sectors respectively. There are no specific mechanisms to avoid conflicting exercise of jurisdiction. In the past, the two regulators have met on an *ad hoc* basis to discuss the grey areas and to seek to achieve a mutually acceptable resolution. The NCC and NBC enjoy a degree of autonomy, but they are not independent of the government.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Appeals from any 'matters, suits and cases, howsoever arising out of or pursuant to or consequent upon [the Communications Act]', can be brought before the Federal High Court and appealed up to the Supreme Court (the highest appellate court). The decision or direction of the NCC that is the subject matter of an application for judicial review will subsist and remain binding and valid until it is expressly reversed in a final judgment or order of the court. The Communications Act, however, states that a person shall not apply to the court for judicial review unless that person has first exhausted all other (administrative) remedies provided under the Act. A person who is aggrieved or whose interest is adversely affected by a decision of the NCC may submit a written request to the NCC asking for a statement of the reasons for the decision. The NCC is required to respond, providing, together with such statement, any relevant information taken into account in making the decision, unless the publication or disclosure of the decision or information would disclose a matter that is, in the opinion of the NCC, confidential, or likely to prejudice the fair trial of a person, or that will involve the unreasonable disclosure of personal information about any individual, including a deceased person. At any time within, but not later than, 30 days after the date of receipt of the NCC's statement of reasons for the decision, an aggrieved person may request a review of the NCC's decision or action. Within 60 days from the receipt of the aggrieved person's written submissions, the NCC is required to conclude its review of the decision (taking into consideration the aggrieved person's submission) and inform the aggrieved person in writing of its final decision thereon and the reasons, therefore. It is only after exhausting the above procedure that the aggrieved person may appeal to the Federal High Court for judicial review of the NCC's decision or action. Although the NBC Act makes no specific provision for review of the NBC's decisions or actions, the courts do have a general power to review the acts of administrative agencies such as the NBC.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Each category of service is regulated by a specific individual or class licence, which prohibits the licensee from engaging in any activity that is not specifically licensed.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

To obtain a licence from the NCC, an application should be made to the NCC for the specific licence sought by the applicant. Upon

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completion, the application form must be submitted with a copy of the applicant's certificate of incorporation, a certified true copy of the Memorandum and Articles of Association, a passport-sized photograph of the applicant's authorised representative, a copy of the applicant's current tax clearance certificate and a feasibility report on the proposed service. Upon approval of the application, the applicant would be required to make payment of the licence fee and value-added tax.

Regarding the media industry, the NBC can only make recommendations to the President for issuance of broadcast licences, as the power to issue licences is vested in the President. The process for obtaining a licence depends on the nature of licence that is sought but generally, an application should be made to the Director General of the NBC, asking for approval to purchase an application form. Upon approval of the application, the form should be purchased, completed and submitted to the NBC together with a copy of the applicant's certificate of incorporation, a certified true copy of the Memorandum and Articles of Association, an engineering design of system (that includes a feasibility study), a letter of undertaking and a letter from the applicant's bankers.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Each licence granted by the NCC or NBC authorises the licensee to carry out a specific number of activities.

The standard terms and conditions of licences can be reviewed on the NCC's website (www.ncc.gov.ng). Most of the licences are valid and subsist for periods ranging from 5–20 years. For example, Unified Access Service ("UAS") Licensees are authorised to offer a range of both fixed and mobile services for a period of 10 years (renewable for five years) subject to any geographical limitations stipulated by the licence. The UAS Licence permits eligible operators to provide both fixed and wireless voice telephony, as well as data services, digital mobile services, internet services, value-added services, international gateway services and other authorised telecommunications services on their networks.

A licence granted by the NCC is personal to the licensee and cannot be operated by, assigned, sub-licensed or transferred to any other party without the prior approval of the NCC. Broadcast licences cannot be assigned.

With regard to change of control, the NCC's Competition Practices Regulations 2007 and the provisions of various communications licences issued by the NCC require a licensee to pre-notify the NCC of proposed changes in shareholding if the number of shares that will change hands subsequent to the issuance of the licence will amount to at least 10% of the total shareholding, any other transaction that results in a change of control of the licensee and any transaction that results in the direct or indirect transfer or acquisition of any individual licence granted by the NCC. On the other hand, the Code requires a licensee to obtain the prior approval of the NBC in respect of any act, agreement or transaction that will directly or indirectly result in a change of the effective control of its undertaking. In relation to licence transfers, broadcast licences are not assignable but the NBC has, in the past, indicated a willingness to approve the transfer of a licence from a licensee to its subsidiary. Failure to obtain the prior approval of the NBC is a ground for the revocation of the licence. The NBC has an absolute discretion whether or not to approve an application for a change of control.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Any person who wishes to install telecoms infrastructure on public land is required to obtain the necessary permit/approval from the relevant authorities. While in respect of private land, that person is required to acquire a leasehold interest in the land to be utilised. Under Nigerian law, all land in a state is vested in the Governor of the State for the benefit of Nigerians. As a result, only leasehold interests can be granted over any property in Nigeria either by an individual or by the Governor of the relevant State in Nigeria. Depending on the nature of the interest granted by an individual, the consent of the State Governor may be required for a valid transfer of a leasehold interest, from one party to another. Where approvals of the State Government, Local Government or any other relevant authority for installation, placing, laying or maintenance of any network facilities on, through, under or across land are required, it shall be the responsibility of such licensees to obtain the required approvals.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

A service provider is obligated to interconnect its communications system with another licensee's network, upon receipt of an interconnection request, in accordance with the principles set out in the Communications Act and pursuant to the terms agreed by the parties in good faith. Licensees are required to negotiate interconnection arrangements in accordance with the principles of neutrality, transparency, non-discrimination, fair competition, cost orientation, universal coverage, access to information, equality of access and equal terms and conditions; and NCC Regulations and Guidelines, including the Telecommunications Networks Interconnection Regulations, Guidelines on Interconnection of Telecommunications Networks, Arbitration Scheme, Interconnection Rate Determination Guidelines, Mediation Rules and Interconnection Dispute Resolution Guidelines.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Operators are required to display a copy of a notice that sets out the tariffs that are approved by the NCC in a publicly accessible part of their offices, and to send a copy of the notice (or the relevant

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part of the notice) to any person who may request the copy. The operators are also required to ensure that their interconnection contracts are registered with the NCC. There is no obligation to publish interconnection contracts.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Parties are generally allowed to negotiate and agree on charges for interconnection between themselves. The NCC has, however, previously used its powers to establish the interconnection rates in situations where operators could not reach an agreement on what these rates should be.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Licensees are required to establish accounting and reporting arrangements sufficient to enable the licensee's finances in relation to the services provided pursuant to the licence to be assessed. A licensee is required to submit separate reports for each telecommunications service it provides (separate from its other commercial activities).

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

There are no specific regulations governing high-speed broadband networks. They are regulated in the same manner as other licensees but as indicated in the Open Access Next Generation Fibre Optics Broadband Network Industry Consultation Paper published by the NCC in November 2013, infrastructure companies licensed by the NCC should provide wholesale layer 2 transmission services on a non-discriminatory, open access and price regulated basis. It was also mentioned in the 'Nigerian National Broadband Plan 2013–2018', that the infrastructure companies would be offered a one-off subsidy based on the peculiarity of the business model and geographical coverage that will provide access to remote areas and thereby enable the NCC to achieve the universal coverage objectives.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Retail tariffs and charges for telecommunications services are fixed by individual operators, but these charges must be approved by the NCC – in the form of a price cap, and licensees may not exceed such rates and charges without the NCC's prior approval. The NCC may intervene in such a manner as it deems appropriate in determining and setting tariff rates for non-competitive services provided by such licensees.

Tariffs must be based on the principles established by the NCC from time-to-time, including the principles of fair and non-discriminatory pricing, cost orientation and an absence of non-competitive discounts.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

No. Depending on the nature of such electronic communications, such services are regulated by the Communications Act or the NBC Act.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Network identifying codes and telephone number range(s) are allocated by the NCC, but the telephone numbers within the number range are determined by the operators. The National Numbering Plan published by the NCC is aimed at the setting up of a numbering scheme and the associated dialling procedures to be used in the network to allow the subscribers and operators to set up calls. The National Numbering Plan also provides for uniform dialling procedures for various types of telephone calls.

2.17 Are there any special rules which govern the use of telephone numbers?

The NCC currently requires operators and customers to register every telephone subscriber identification module ("SIM") card that is currently in use in Nigeria. Unregistered SIM cards have been disconnected.

2.18 Are there any obligations requiring number portability?

Yes. Following the introduction of number portability in April 2013, operators are obliged to accept porting requests from subscribers. The Mobile Number Portability Business Rules and Port Order Processes limit the ability of subscribers to port their numbers to once in every 90 days.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The NCC and NBC are responsible for regulating the use of spectrum in Nigeria. With respect to any radio frequency ("RF") licences required for the provision of a telecommunications service, licensees are required to obtain specific frequency licences from the NCC. The NCC grants such licences pursuant to powers bestowed by the WTA. The WTA also authorises the NBC to assign RF for the broadcasting sector.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

RF may be assigned by one or a combination of several methods ranging from 'first come, first served' (where supply exceeds demand), to auctions (where demand exceeds supply), to automatic

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assignment (where, as with microwave frequency, there is unlimited sharing capability). This is based on the Commercial Frequency Management Policy, Administrative Procedures and Technical Guidelines issued by the NCC in 2007. RF may only be shared, transferred or traded with the NCC's permission.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Yes, the 5.35–5.35GHz and 5.725–5.875GHz bands have been declared to be licence-exempt by the NCC. Some of the conditions for use are that all sites deploying licence-exempt bands must be registered with the NCC, the average time of occupancy on any frequency should not be greater than 0.4 seconds within a 30-second period and for frequencies greater than 10MHz above or below the bed, the level must be greater than -27dBm/MHz.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The NCC's Frequency Spectrum (Fees and Pricing, etc.) Regulations, published in 2004, provides that the price of a frequency spectrum shall be directly proportional to the size of the frequency spectrum assigned. For instance, the unit price per MHz for Tier 1 licensing region comprising only of Lagos State is =N=3,000,000 (three million Naira), while Tier 2 (comprising Delta, Kaduna, Kano, and Rivers States and the Federal Capital Territory, Abuja), and Tier 3 (comprising Abia, Anambra, Edo, Ogun and Oyo State) cost =N=1,500,000 (one million five hundred thousand Naira).

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The licence remains valid provided that the prior consent of the NCC was obtained for the change of control.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

The grant of an RF spectrum licence is personal to the licensee. The Commercial Frequency Management Policy, Administrative Procedures and Technical Guidelines, issued by the NCC in January 2007, prohibit the trading, transfer or sharing of RF to a third party, including the licensee's subsidiary or associated companies, without the prior approval of the NCC.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The principal legislation in relation to cybersecurity in Nigeria is the Cybercrimes (Prohibition, Prevention, etc.) Act, 2015 (the "Cybercrimes Act"). The other relevant legislations are the Terrorism Prevention Act 2011 (as amended) and the NCC's Guidelines for the Provision of Internet Service ("NCC Internet Service Guidelines").

The Cybercrime Act was enacted in 2015 to provide measures for national cybersecurity and the prevention, detection, response and prosecution of cybercrimes and other related matters. It criminalises several illegal activities including hacking, phishing, spamming, system interference, unlawful interceptions, computer-related forgery, issuance of fake electronic or verbal messages by the staff or agent of a financial institution, denial-of-service attacks, identity theft or fraud, electronic theft, unlawful interference with critical national information infrastructure, etc. The Cybercrimes Act also imposes obligations on service providers, financial institutions and other corporate entities.

As is the case with the Cybercrimes Act, the Terrorism Prevention Act 2011 (as amended) ("TPA") provides for intelligence gathering through the lawful interception of communications.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Cybercrimes Act states that where there are reasonable grounds to suspect that the content of any electronic communication is reasonably required for the purpose of a criminal investigation or proceedings, a Judge may on the basis of a statement on oath, require a service provider to "intercept, collect, record, permit or assist competent authorities with the collection or recording of content data and/or traffic data associated with specified communications transmitted by means of a computer system". The judge may also authorise a law enforcement agent to collect or record electronic communications through application of technical means.

A service provider is also required by Section 40 of the Cybercrimes Act to comply with a Judge's order to "intercept, collect, record, permit or assist competent authorities with the collection or recording of content data and/or traffic data associated with specified communications transmitted by means of a computer system" and to generally assist with the identification, apprehension and prosecution of offenders.

Under the TPA, law enforcement agencies have the power to apply for a court order to compel communication service providers to intercept specified communications, provided they obtain the requisite approvals of the Attorney-General and the National Security Adviser. A judge can also, by an order, require a telecom provider to intercept and retain specified communication received or transmitted by that service provider, or authorise the relevant law enforcement agency to enter any premises and install and subsequently remove any device with which a communication or communications of a specified description may be intercepted and/or retained, for purposes of intelligence gathering.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

By virtue of the Communications Act, the NCC may determine that a licensee or class of licensees should implement interception capabilities and specify the technical requirements for such interception. Under the TPA, law enforcement agencies (as defined) have the power to apply for a court order to compel communication service providers to intercept specified communications, provided they obtain the requisite approvals of the Attorney-General and the National Security Adviser. We confirm that the laws cover the forms of communication specified above.

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4.4 How does the state intercept communications for a particular individual?

Under the Cybercrimes Act and TPA, upon an application, a judge could require a telecoms provider to intercept and retain specified communication received or transmitted by that service provider, or authorise the relevant law enforcement agency to enter any premises and install and subsequently remove any device with which a communication or communications of a specified description may be intercepted and/or retained, for purposes of intelligence gathering. In addition to the above, the Cybercrimes Act also empowers a judge to authorise a law enforcement agent to collect or record electronic communications through application of technical means.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are presently no rules governing encryption.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

By virtue of section 38 of the Cybercrimes Act, a service provider is required to keep all traffic data and subscriber information that may be prescribed by the NCC, for a period of two years. Traffic data is defined in the Cybercrimes Act as "any computer data relating to a communication by means of a computer system or network, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service".

On the other hand, the Guidelines for the Provision of Internet Service require internet service providers to retain internet service-related information, including user identification, content of user messages and traffic or routing data for a minimum period of 12 months or any other period directed by the NCC.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Any person that wishes to operate a broadcast system, facility or any wireless equipment that uses broadcast frequencies is required by the NBC Act and the Code to be so authorised by the NBC through the assignment of a frequency, channel or licence by the NBC. A separate licence is required for each broadcasting undertaking.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

No. Both content broadcasters over the traditional distribution platforms and internet platforms are required to obtain licences from the NBC in so far as they wish to carry out their operations from within Nigeria. Their content is usually monitored for compliance with the requirements of the NBC Act, the Code and any other directives issued by the NBC.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The categories of licences that can be granted by the NBC are as follows:

a) Terrestrial Broadcast; Free-to-air (Audio and Video).
b) Satellite Broadcast; Free-to-air (Audio and Video).
c) Terrestrial Broadcast; Subscription (Audio and Video).
d) Satellite Broadcast; Subscription DSB (Audio and Video).
e) Satellite Broadcast; Subscription DTH (Audio and Video).
f) Digital Terrestrial Television.
g) Cable Television Subscription.
h) Community (Radio and Television).
i) Networking (Radio and Television).
j) Content Distribution (syndication).
k) Internet Broadcasting.
l) Signal Distributor.

The obligations of these licences are contained in the Code, published by the NBC, and are available for review at www.nbc.gov.ng.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Broadcast licences are not assignable but the NBC has, in the past, indicated a willingness to approve the transfer of a licence from a licensee to its subsidiary. Change of ownership of a licensee is permitted by the NBC subject to the approval of the NBC being obtained prior to completion of the transaction. Failure to obtain the prior approval of the NBC is a ground for the revocation of the licence. The NBC has absolute discretion whether or not to approve an application for a change of control. Timing for the approval is also discretionary.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

As far as we are aware, this issue has not been adjudicated upon by Nigerian courts.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

The Guidelines for the Provision of Internet Service requires 'all licensees providing internet services or any other related internet protocol based telecommunications service' to cooperate with 'all law enforcement and regulatory agencies investigating cybercrime or other illegal activity' and to 'provide any service related information requested by the NCC or other legal authority, including information regarding particular users and the content of their communications'.

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6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

There are no other specific regulations or guidelines on net neutrality, but the Internet Services Licence issued to Internet Service Providers prohibits a licensee from showing undue preference to, or discriminating against, any person in respect of the provision of a service under the Licence or the connection of any equipment approved by the NCC.

Licensees are permitted to individually charge for the different types of traffic over their networks subject to approval of the tariffs by the NCC.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

The Communications Act and NCC's Guidelines for the Provision of Internet Services prohibit ISPs from disseminating, causing to be disseminated or allowing to be accessed through its network, any information that directly, or indirectly, casts aspersions on a religious, political, ethnic group or race, any pornographic material, any obscene articles or any seditious material (as defined under the Nigerian Criminal Code). There is no indication that consumer VPN services are being regulated or blocked presently.

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Jumoke has assisted various operators within and outside the telecommunications and broadcasting sectors with establishing and doing business in Nigeria, as well as a variety of investors with the acquisitions of interests in Nigerian companies and regulatory compliance. She is also recognised by the Nigerian edition of *Who's Who Legal* for her M&A practice. Her work has been noted in the International Financial Law Review's *Expert Guides*, the Global Legal Group Guides and *Getting the Deal Through* Guides. She is a fellow of the Centre for International Legal Studies ("CILS").

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He is a core member of the team that advises multinational telecommunications operators in all areas of their operations, including regulatory compliance and real property acquisitions. As part of his telecommunications practice, he advises and represents various clients in negotiations with regulatory authorities, and assists with procuring operational and regulatory permits relevant to their businesses and transactions in Nigeria. In addition to his work in the practice areas mentioned above, Godson regularly advises the firm's clients in connection with the collection, processing, storage and transfer of personal information under the applicable laws in Nigeria.

Godson has been a contributor to the *World Bank Doing Business Reports* ("Registering Property in Nigeria") since 2009, the *International Law Office Newsletters* (Telecoms and Media) from 2012–2014, and the *International Comparative Legal Guide to: Telecoms, Media and Internet Laws and Regulations* since 2013.

UDO UDOMA & BELO-OSAGIE
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Udo Udoma and Belo-Osagie ("UUBO") is one of Nigeria's larger, full-service corporate and commercial law partnerships with offices in four of Nigeria's key business centres and an affiliate in Ghana. Our 12 (twelve) partners and 52 (fifty-two) associates work with our Nigerian and non-Nigerian clients to create and implement innovative transactions, financial and otherwise, designed to facilitate business in Nigeria and throughout West Africa. UUBO has been described in international rankings as one of Nigeria's "Magic Triangle" law firms – a description underscored by one of the highest ratios of internationally recognised partners per firm in the Nigerian legal market. As a firm, we seek to provide timely, practical, sophisticated and responsive legal solutions based on a philosophy of consistently striving to structure accessible, commercially-oriented advice tailored to the needs of each client.

UUBO has a robust telecommunications practice that has maintained a strategic market position since the liberalisation of the sector in the early 1990s. In 2002, the firm advised one of the bidders for the GSM licences that were auctioned in that year and continues to provide advice on licensing and other operational requirements to various private telecommunications operators that provide a range of services including local and international VSAT, internet and fixed wireless services. The firm consistently advises on TMT laws, regulations, licensing, practices and developments, compliance and investments, as well as data protection and privacy.

Although we are a full-service firm, we are especially well regarded in our niche specialisations, which include: private equity; energy, electric power and natural resources; banking, finance and capital markets; corporate restructuring (including mergers and acquisitions); project finance; foreign direct investments; taxation; labour and employment. Together with our litigation, alternative dispute resolution and company secretarial departments, we are able to provide proactive and cost-effective legal services throughout Nigeria and to clients outside Nigeria.

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Pakistan

Aemen Zulfikar Maluka

Josh and Mak International

Pir Abdul Wahid

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(a) Pakistan Profile (Latest data available: 2016)

Various statistics (Latest data available: 2016)	
Fixed-telephone subscriptions per 100 inhabitants	1.6
Mobile-cellular subscriptions per 100 inhabitants	71.4
Fixed (wired)-broadband subscriptions per 100 inhabitants	1.1
Mobile-broadband subscriptions per 100 inhabitants	20.1
Households with a computer (%)	16.2
Households with Internet access at home (%)	22.1
Individuals using the Internet (%)	15.5

(b) Pakistan has one of South Asia's most active media markets with a vibrant broadcast sector. Dominated by cable, the audio-visual market includes channels across television technologies.

While the Pakistan Electronic Media Regulatory Authority (PEMRA) is only authorised to regulate the private broadcast sector, private owners argue that state-run broadcasters have an unfair advantage as they benefit from millions of Rupees in annual government grants while also receiving advertising funds from the private sector.

Direct-to-home (DTH) television became topical after PEMRA postponed bidding for licences just three days ahead of the auction.

Scheduled to take place in December last year, the bidding process is expected to resume in the first half of 2016 and set to involve millions of dollars of investment and revenue.

Currently, the foreign shareholding limit in electronic media is restricted to below 50% of the total shareholding as per Section 25 of PEMRA Ordinance 2002 (Amendment Act 2007). It is apprehended that restrictions on a foreign shareholding limit may represent a strong barrier to the inflow of foreign investment in the electronic media sector in Pakistan.

DTH is a capital-intensive project and as it is a new technology for the country, its expertise are not sufficiently available in Pakistan. Moreover, its successful launch will result in the investment of millions of dollars into the country, a huge generation of revenue for the national exchequer and a growth in jobs for the youth.

Under Rule 13 of the PEMRA Rules 2009, broadcasters cannot be issued any distribution service licence including DTH or *vice versa* ("DTH Service" means Direct-to-Home distribution of audio-visual signals received via satellite to small dish antennas across the footprint of the satellite to subscribers).

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most important legislation which applies to the telecoms and audio-visual media distribution sectors in Pakistan are the following:

1. Pakistan Telecommunication (Re-Organization) Act, 1996 (with 2006 amendments).
2. AJK Adaptation of the Pakistan Telecom Re-Organization Act, 2005.
3. Gilgit Baltistan Adaptation Order, 2006.
4. Pakistan Telecom Rules, 2000.
5. Access Promotion Contribution Rules, 2004.
6. USF Rules, 2006.
7. Amendments – USF Rules, 2006.
8. R&D Fund Rules, 2006.
9. Mobile Device Identification, Registration and Blocking Regulations, 2017.
10. Access Promotion (Amendment) Regulations, 2016.
11. Telecom Consumer Protection (Amendment) Regulations, 2016.
12. Regulations for Technical Implementation of Mobile Banking, 2016.
13. Regulations for Technical Implementation of Mobile Banking, 2016.
14. Class Licensing & Registration (Amendment) Regulations, 2016.
15. Broadband Quality of Service Regulations, 2014.
16. Telecom Consumers Protection (Amendment) Regulations, 2012.
17. Subscriber Antecedents Verification (2nd Amendment) Regulations, 2012.
18. Cellular Mobile Network Quality of Service (Amendment) Regulations, 2012.
19. Pakistan Telecommunication Authority (Functions & Powers) (Amendment) Regulations, 2012.

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20. Telecommunication and Terminal Equipment Installer Regulations, 2012.
21. Subscribers Antecedents Verification (Amendment) Regulations, 2012.
22. Mobile Virtual Network Operation (MVNO) Regulations, 2012.
23. Telecom Consumer Protection (Amendment) Regulations, 2011.
24. Numbering Allocation and Administration Regulations, 2011.
25. Cellular Mobile Quality of Service Regulations, 2011.
26. Access Promotion Regulations, 2005.
27. Access Promotion Regulations, 2005 Amendments.
28. Subscribers Antecedents Verification Regulations, 2010.
29. GPRS/EDGE Service Quality of Service Standards Regulations, 2010.
30. Telecommunication System Clock.
31. Telecom Consumers Protection (Amendment) Regulations, 2010.
32. Amendment in Class Licensing and Registration Regulations.
33. Monitoring and Reconciliation of Telephony Traffic Regulations, 2010.
34. Interconnection Dispute Resolution (Amendment) Regulations, 2010.
35. Protection from SPAM, Unsolicited fraudulent and obnoxious communication Regulations, 2009.
36. Telecom Consumer Protection Regulations, 2009.
37. Protection from Health Related Effects of Radio Base Station Antenna Regulations, 2008.
38. Monitoring and Reconciliation of International Telephony Traffic Regulations, 2008.
39. Amendments – PTA (Functions & Powers), Regulations, 2006.
40. Amendments – Class Licensing and Registration Regulations, 2007.
41. Accounting Separation Regulations.
42. Access Promotion Regulations, 2005.
43. Number Allocation and Administration Regulations, 2005.
44. Mobile Number Portability Regulations, 2005.
45. Fixed Line Tariff Regulations, 2004.
46. Interconnection Dispute Resolution Regulations, 2004.
47. Pakistan Telecommunication Authority (Functions & Power) Regulations, 2006.
48. Amendments in Type Approval Regulations, 2006.
49. Type Approval Regulations, 2004.
50. Class Value Added Services Licensing and Registration Regulations, 2007.
51. Amendments in CVAL's Regulations.
52. SRO No.221-I-2017-Notification, dated 31-03-2017 pdf.
53. The Prevention of Electronic Crimes Act, 2016 (Act No.XL of 2016).
54. Pakistan Telecommunication (Re-Organization) Act, 1996 (with 2006 amendments).
55. ETO Act.
56. Telegraph Act, 1885.
57. Wireless Act.
58. Pakistan Telecom Rules, 2000.
59. Access Promotion Contribution Rules, 2004.
60. USF Rules, 2006.
61. Amendments – USF Rules, 2006.
62. R&D Fund Rules, 2006.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The government ministries, regulators, other agencies and bodies which have a role in the telecoms and audio-visual media distribution sectors are the following:

1. Pakistan Telecommunications Authority (PTA).
2. PEMRA.
3. Ministry of Information Technology.
4. IT & Telecom Division.
5. National Telecommunication Corporation (NTC).
6. Pakistan Software Export Board (PSEB).
7. Board of Investment.
8. Central Board of Revenue.
9. Universal Service Fund.
10. Electronic Government Directorate (EGD).
11. Pakistan Government Official Portal.
12. Trade Development Authority of Pakistan (Formerly EPB).
13. Privatization Commission.
14. National ICT R&D Fund.

Key Policies for the Telecoms Sector in Pakistan

De-Regulation Policy 2003	Cellular Mobile Policy 2004	NGMS Policy 2013–14
Fixed Line Sector Policy.	Mobile Sector Policy.	Mobile Sector Policy.
Open and technology neutral.	Technology neutral.	Technologies 3G/4G and above.
Licence term – 20 years.	Two new cellular licences were issued for 15 years.	Four new NGMS licences were issued for 15 years.
Local Loop (LL) – ILF US$ 10,000/ region – 14 regions.	Open auction.	Open SMRA auction.
Scope-LL services in a licensed region. LM for WLL.	Promoted efficient use of Spectrum.	Promoted efficient use of spectrum.
Wireless Local Loop Option (Spectrum auctioned).	Fair competition amongst mobile and fixed line operators.	Existing operators to pay same amount for renewal.
Long Distance and International (LDI) – ILF US$ 500,000.	Existing operators to pay same amount for renewal.	Promoted use of advanced technologies, infrastructure sharing, national roaming, mobile number portability.
Deregulated incumbent operator PTCL.	Promoted infrastructure sharing, national roaming, mobile number portability.	ASAF, R&D, USF and ARD fees.
Introduced APC, USF, R&D and ARFSF regime.	ASAF, R&D, USF and ARD fees.	

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1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Please note that the liberalisation of the telecoms and audio-visual distribution sectors are as follows:

a) Telecoms have been liberalised as of 1996. There are no restrictions on foreign investments in companies providing IT and telecom services except for minimum investment requirements under the prevalent investment policy of Pakistan.

b) For b) see question 1.1 above. Broadcasters are regulated separately from telecoms in Pakistan. The former are regulated under the Pakistan Electronic Media Regulation Authority Ordinance, 2002, whereas the latter are regulated under the Act.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Yes, Pakistan has adopted the WTO Basic Telecommunications Agreement. It is in compliance with all of its obligations, which include the provision of basic voice telephone services, cellular mobile services, data services and private leased line devices amongst others.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The PTA regulates the establishment, operation and maintenance of telecommunication systems and provision of telecommunication services in Pakistan under state legislation (see above).

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

They are all state owned. The PTA and MOIT control and regulate Telecoms and IT as well as the related ministries. The PTA is responsible for ensuring the existence and maintenance of fair competition in the telecommunications sector. Anti-competitive practices are subject to general competition law. The Competition Act 2010 prohibits the abuse of a dominant position by an undertaking, simultaneously proscribing agreements between and amongst undertakings which, *inter alia*, alter market conditions artificially. Undertakings are not allowed to enter into deceptive market practices, which are detrimental to the interests of other undertakings. Mergers and acquisitions have to be approved by the Competition Commission of Pakistan in accordance with the Competition Act 2010 and the rules and regulations framed there under from time to time.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Yes, appeals go to the high court on the basis of what is provided in the main legislation. The Pakistan Telecommunication Authority (the "PTA") regulates the telecommunication sector in Pakistan. It was established under the Pakistan Telecommunication (Re-Organisation) Act, 1996 (the "Act"). It regulates the establishment, operation and maintenance of telecommunication systems and the provision of telecommunication services in Pakistan.

Individuals or bodies aggrieved by any decision or order made by the PTA, may, within 30 days of the receipt of such decision or order, appeal to the High Court.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

As issued by the ministry/PTA, Type Approval Regulations, the following authorisations exist:

Type of Licensing Requirement	Main Features	Examples
Individual Licences (Operator Specific Licences)	■ Issued to a single operator ■ Usually a customised document ■ Often contains detailed conditions ■ Frequently granted through competitive process	■ Basic PSTN services ■ Mobile & fixed wireless services (Spectrum)
General Authorisations (Class Licences)	■ Where significant regulatory objectives can be achieved by establishing general conditions ■ Sets out basic rights and obligations, and regulatory provisions of general application ■ No competitive selection process; all qualified are authorised	■ Data transmission services ■ Resale services ■ Private networks
Open Entry	■ No authorisation process or qualification ■ No requirements, beyond rules generally applicable to the ICT sector ■ Registration requirements or other rules of general application are sometimes imposed by regulation	■ Internet Service Providers ■ Value added services

Under the Telecoms Act 1996 (section 29), no terminal equipment can be directly or indirectly connected with a public switched network unless it has been type approved by the PTA. Type approval

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granted by the PTA (Pakistan Telecommunication Authority) signifies that particular telecommunication equipment is approved for general sale and is suitable to connect with a specific public telecommunications network.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

The main requirements of general authorisations (data transmission services, resale services, private networks) are:

- significant regulatory objectives that can be achieved by establishing general conditions;
- the setting-out of basic rights and obligations, and regulatory provisions of general application; and
- the absence of a competitive selection process; all qualified are authorised.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Individual authorisations pertain to Basic PSTN services, mobile, fixed and wireless services (Spectrum), and their main features are:

- they are often issued to a single operator;
- they are usually a customised document;
- they often contain detailed conditions; and
- they are frequently granted through a competitive process.

Telecoms services cannot be resold without the prior written consent of the PTA. No distinction is made between domestic or foreign companies in this regard.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Carriers are not required to make network components available to their competitors until they enjoy SMP. Carriers who are requested to interconnect with other operators are required to provide access to those components of their network which are needed to ensure interconnection. The requesting operator is only required to pay for the network components or interconnection facilities if it requires a carrier who has been given an infrastructure licence and has been determined to possess SMP in the relevant market by the PTA, and is required to provide access to its ducts, poles, towers, or other similar facilities for use by licensed telecoms infrastructure facility providers.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Carriers are required to respond to the request to provide interconnection to other operators wishing to connect. The PTA Rules (the "Rules") and the Interconnection Guidelines, 2004 (the "Guidelines") regulate the interconnection between carriers. Where an operator submits its request for interconnection with another, the former is required to respond in writing. It may accept the request completely or partially. It can only deny the request in its entirety based on reasons which have been given fairly.

The Co-Location Space is solely for the purpose of the Operator to access the respective submarine cable system landed in the station. For the avoidance of doubt, the interconnection service between the Operator's Co-Location Equipment at the Co- Location Space to the related submarine cable systems is not covered in this Schedule. PTCL shall offer to provide the interconnection service to the Operator pursuant to a tariff filed with and approved by the Authority.

In cases where PTCL cannot offer physical co-location due to space limitations or any other legitimate reasons, PTCL will take reasonable measures to propose an alternative solution. Such alternative solutions may include options such as virtual co-location, optimising the use of existing space or finding adjacent space.

Subject to the rules and guidelines, a carrier is entitled to fix different tariffs and terms and conditions in respect of interconnection services for different categories of operators and interconnection services where the differences can be objectively justified on the basis of the costs incurred in providing such services. Such tariff has to be approved by the PTA from time to time.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

All commercial operators serve consumers/the public. Carriers, who are requested to interconnect with other operators, are required to provide access to those components of their network, which are needed to ensure interconnection. The requesting operator is only required to pay for the network components or interconnection facilities it requires. A carrier, which has been given an infrastructure licence and has been determined to possess SMP in the relevant market by the PTA, is required to provide access to its ducts, poles, towers, or other similar facilities for use by licensed telecom infrastructure facility providers. Please also see questions 2.8 and 2.9 above.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Subject to the rules and guidelines, a carrier is entitled to fix different tariffs and terms and conditions in respect to interconnection services for different categories of operators and interconnection services, where the differences can be objectively justified on the basis of the costs incurred in providing such services. Such tariff has to be approved by the PTA from time to time.

However, the government has recently asked operators to devise proper notices to avoid bill shocks to consumers making cross network calls. This is still being discussed. See http://www.pta.gov.pk/media/cons_paper_avoiding_bill_shock_130917.pdf.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Yes, operators are subject to all of the three separations.

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2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

The Government of Pakistan aims to increase broadband penetration in the country. The Broadband Policy, 2004 delineates a number of cost-cutting measures, which include, *inter alia*, reduction in international IP and domestic bandwidth prices. Provision is also made for the reduction of the primary rate interface ("PRI") charges to a level where the gap created in the dial up infrastructure usage by the dial up users switching over to broadband services would not make the operational and capital expenditure in the PRI service a liability for the internet service providers.

In the light of the Telecoms Policy 2015, the Pakistan Telecommunications Authority ("PTA") has prepared financially viable and technologically compatible frameworks for wireless telephony operators, as the Wireless Local Loop ("WLL") sector is rapidly losing its ground and subscribers.

As per PTA statistics, WLL services commenced in 2004 during the time when the fixed telephony sector was the biggest in terms of connections and sector-wise growth. The WLL sector was set up to work in areas where landline services could not be provided due to their location and lack of economic viability.

However, mobile phone services were introduced with a couple of operators, but their services were too costly at the time. The WLL sector rapidly lost its ground and lost subscribers, along with the closure of services by various operators. The subscriber base stood at 375,653 at the end of 2016.

As of 2017, spectrum trading and sharing frameworks are also being prepared, enabling the wireless operators to increase spectrum efficiency, which will result in the provision of high quality services at competitive prices. The mutual agreements/arrangements between the WLL operators will provide a lifeline to an ailing industry.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

See questions 2.9 to 2.13 above.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The tariff payable to wireline service providers is regulated. The Fixed Line Tariff Regulations, 2004 regulate the rates charged for the provision of telecommunication services by Local Loop ("LL") and Long Distance and International Telephony ("LDI") operators.

Operators who do not have Significant Market Power ("SMP") are free to set and revise their tariffs at any time and in any manner they like. They are required to inform the PTA about the proposed tariffs 30 days before the applicability of new tariffs.

LL and LDI operators which are determined to have SMP status in an LL fixed line telecommunication market by the PTA are required to ensure that the weighted average price increase charged in each consecutive 12-month period should be fixed so as to satisfy the criteria formulated in the LL Price Control Formula and the LDI Price Control Formula respectively. The tariff for leased lines services is to be based on costs.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

In a local loop licence, the licensee has the right to request geographic and non-geographic numbers from the PTA, as well as short codes, in accordance with the national numbering plan developed by the Authority, for use in the provision of the licensed services in the areas concerned. The licensee can allocate individual numbers to customers from the blocks allocated to it by the Authority and shall maintain suitable records of its utilisation of numbering capacity, subject to the following conditions:

(a) 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

(b) the allocation of a number does not confer ownership of the number by 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.

2.17 Are there any special rules which govern the use of telephone numbers?

See question 2.16.

2.18 Are there any obligations requiring number portability?

See question 2.16.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The Frequency Allocation Board (the "Board") established under Section 42 of the Act has the exclusive authority to allocate and assign portions of the radio frequency spectrum to the Government, providers of telecommunication services and 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 Board within 30 days from receipt of such application.

On receipt of the application, the Board classifies the telecommunication services and allocates or assigns the specific frequencies to the applicant. The Board is required to notify the applicant of the status of the application within three months.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

See question 3.1 above. In order to obtain a radio spectrum allocation, the process is to apply to the PTA, who will send the

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application to Frequency Allocation Board ("FAB") within 30 days. The PTA then grants a wireless licence on receipt of frequency allocation from FAB. FAB takes a maximum of three months for deciding on an application for frequency allocation.

Available frequencies are as follows:

- 400 MHz, 800 MHz.
- GSM Band: 890-960 MHz.
- Only 5 MHz are available as the rest is already allocated. 800 MHz is fully allocated.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

See question 3.1 above. While some frequencies are deregulated, that is S-Band: 2.4735 GHz to 2.4835 GHzC-Band: 5.725 GHz to 5.850 GHz, licences are mandatory.

Site approval is required even for setting up a point to point wireless system in de-regulated band against a fee of Rs. 26,000/- per link.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

See question 3.3 above. They are specified by the PTA.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

See question 3.1 above.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

See question 3.1 above.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

On August 11, 2016, the Government of Pakistan passed the Prevention of Electronic Crimes Act ("PECA"), a controversial cybercrime law with broad reach. The PECA has come under fierce criticism by domestic and international rights organisations and bodies, not just for reportedly disproportionate penalties, but for overly broad language that runs the risk of ensnaring innocent internet and digital service users, depending on the interpretation of "authorised officers". The PECA has also come under fire for including data retention provisions that make it mandatory for service providers to hold traffic data for a minimum 90-day period or as "authorised officers" see fit. The PECA does not, however, explicitly list any provisions for data privacy or protection, outside of conditions that officers of the law must provide anyone "with a legal right to the data" a list of said data, and copies of said data, though this can be refused by an "investigating officer" if there are "reasonable grounds". Via this language, the PECA attempts to skirt around the lack of stringent data protection provisions or oversight within the overall legislation. Service providers cannot refuse to hand over data, for example, or else risk being penalised by the government, for instance. Further to this, Article 39 of the PECA, "International Cooperation", permits the government to share whatever data it gathers with foreign government agencies in the context of the powers of this Act, even without "prior request" by said foreign partners.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Telecommunications Reorganization Act

The Act also contains a number of troubling provisions relating to disconnection of services. Article 21(4)(f) authorises that all licences granted by the Authority contains an obligation to "disconnect telecommunication service from any user who, after written notice, misuses it". Article 54(3) of the Act provides that following the issue of a decree by the President, the Federal Government can suspend any or all licences for those providing telecommunications services. The Act also includes a number of provisions that restrict the ability of users to be able to communicate privately or to use systems to access the Internet and other ICTs without interference and surveillance. Article 2(ac) defines "Approved Crypto Apparatus", while Article 5(2)(b) gives powers to the Authority to "monitor and enforce licences". Article 32 gives Courts the power to authorise searches for "unapproved crypto apparatus" or "other unapproved terminal equipment". Article 5(2)(b) was used as justification for the "Monitoring and Reconciliation of Telephony Traffic Regulations, 2010" and 21 July 2011 Directive ordering internet service providers ("ISPs") and mobile phone companies to block users from using encrypted networks ("VPNs") to access the internet.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

See question 4.2.

4.4 How does the state intercept communications for a particular individual?

See questions 4.2 and 4.6.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

See question 4.6 below.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

The passage of the Prevention of Electronic Crimes Act in August 2016 – which allows for retention of user data as authorities see fit, and sharing of data between the government of Pakistan and foreign agencies and states – and the absence of data and privacy protection legislation in Pakistan give the need for transparent privacy policies greater necessity.

Mobile operators are, based on their licences, required to maintain call records including called and calling numbers, date, duration, time, IMEI and location details with regard to the communications made on their respective Telecommunication Systems for a

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period of one year for scrutiny by or as directed by the Pakistan Telecommunication Authority. In addition, they are also required to record/store data session logs/info along with IP address for one year for scrutiny by or as directed by the Pakistan Telecommunication Authority.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The Pakistan Electronic Media Regulatory Authority Ordinance, 2002 and its relevant legislation, PEMRA, as a regulating body has the power to issue the relevant "licences", which means licences issued by the Authority to establish and operate a broadcast station or distribute programmes, through a cable television network.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

PEMRA takes care of traditional distribution platforms and PEMRA and PTA jointly look after internet based platforms such as YouTube, etc. Any operator will need to obtain a licence from the PTA and the FAB before importing any transmitting apparatus for broadcasting or for a CTV operation system.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The PEMRA Authority can issue licences for broadcast and CTV stations in the following categories, namely:

(i) International scale stations.
(ii) National scale stations.
(iii) Provincial scale stations.
(iv) Local Area or Community based stations.
(v) Specific and specialised subject stations.
(vi) Cable Television Network stations.

Provided that the Authority may divide any of these categories into sub-categories as may be required.

As per section 19 PEMRA Ordinance 2002: Licence to broadcast or operate. The Authority has exclusive rights to issue licences for the establishment and operation of all broadcast stations including the Cable TV network, provided that this exclusive right shall be used by the Authority 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 case of radio, television and 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 the Authority. No person or entity can engage in broadcasting or CTV operation except after obtaining a licence issued under this Ordinance.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Yes they can be assigned subject to certain restrictions. Under the PEMRA Ordinance, restrictions are in place to not sell, transfer or assign any of the rights conferred by the licence without prior written permission of the Authority.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

This is a tricky area of law, and there have been instances, where entire licences have been cancelled when state laws were ignored.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

A court order will be required for the content owners before the Operators will enforce such a request.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

This concept has not reached Pakistan yet.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Yes, as per orders of PEMRA under the PEMRA Ordinance 2002.

VPN Services are very much active and valid in Pakistan.

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The firm, which is listed in *The Legal 500*, prides itself in the provision of efficient and innovative solutions to its clients' commercial, legal, regulatory and structural challenges. The firm's extremely enterprising team gives quick responses to online queries reinforcing its zeal for excellence. The lawyers at Josh and Mak have the ability to provide effective responses to client queries, and this is what distinguishes them from other local consultancy firms. The firm's approach is not only novel and innovative but also attuned to the demands of the international corporate sector. The associates and partners at Josh and Mak International want clients to rely on them for realistic and incisive advice about their legal matters. The firm's specialisations include legal advisory in matters such as energy and petroleum, telecommunications, internet and media, intellectual property, dispute resolution and taxation, to name a few.

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Portugal

Leonor Chastre

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Cuatrecasas

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

a) Regarding the telecoms sector, including internet:

i) Annual revenue: this figure is not available at this time.

ii) The most important companies in the telecoms industry are MEO – *Serviços de Comunicações e Multimédia*, S.A. (Group Altice); NOS Group and Vodafone Portugal – *Comunicações Pessoais*, S.A. (Group Vodafone).

b) Regarding the audio-visual media distribution sectors:

i) Annual revenue: more than 1 billion EUR (according to data from the ERC 2016 Report).

ii) Most significant market participants: MEO – *Serviços de Comunicações e Multimédia*, S.A. (Altice Group); Grupo NOS and Vodafone Portugal – Comunicações Pessoais, S.A., Grupo Media Capital, Grupo Impresa.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most important legislation regarding the telecoms and audio-visual media distribution sectors are as follows:

a) Telecoms, including internet:

- Law n.º 5/2004 of 10 February;
- Law n.º 91/97 of 1 August; and
- Law Decree n.º 31/2003, 17 February.

b) Audio-visual media distribution sectors:

- Law n.º 55/2012 of 6 September; and
- Law Decree n.º 124/2013 of 30 August.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

In relation to telecoms, including internet, the Portuguese Competition Authority and the Portuguese Communications Authority are the main regulators. In terms of the audio-visual media distribution sectors, the Portuguese Competition Authority and the Regulatory Authority are the main regulatory bodies for the Media.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Both telecoms and audio-visual media sectors have been liberalised and open to foreign investment.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Portugal has been a member of the World Trade Organisation since 1 January 1995.

After the Uruguay Round, sectoral negotiations took place in the WTO: on the movement of natural persons (1995); on telecommunications (1997); and on financial services (1997). During the sectoral negotiations, participating countries took new commitments specifically in those sectors. These new schedules replaced the corresponding section in the original schedules.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of telecoms (or electronic communications) networks and services are regulated by two regulatory authorities: the Portuguese Competition Authority; and the Portuguese Communications Authority.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The Portuguese Competition Authority and the Portuguese Communications Authority are the main regulatory and competition

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law authorities in the Portuguese jurisdiction. Concretely, ANACOM is responsible for the regulation of the communications sector, including electronic and postal communications, and has the power to sanction, regulate and supervise within this sector. The role of the Portuguese Competition Authority is to ensure compliance with the competition rules in Portugal, and cooperates with regulators such as ANACOM to do so.

Although ANACOM has as one of its multiple functions in the communications sector, the promotion of competition in the provision of networks and services in this duty is complemented with the fundamental role of the Competition Authority. In accordance with Article 11 of ANACOM statutes in matters related to the application of the legal organisation of competition in the communications sector, ANACOM and the Competition Authority should cooperate and collaborate with each other and respect their individual duties.

Both entities assist the government in their areas but they are, in their nature, an independent administrative body. They are organic, functional and technically independent from the government.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

ANACOM's decisions are subject to appeal at the Portuguese Competition, Regulation and Supervision Court in accordance with Article 51º of the ANACOM status.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

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.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

In order for an entity to provide electronic communication services in Portugal, it will need to have previously submitted a statement before ANACOM under the general authorisation regime. In accordance with this regime, the offering of services does not rely on a previous decision from ANACOM. Undertakings are, nonetheless, under an obligation to notify ANACOM of the network and services to be provided, including its identification elements. After this communication, the notifying entity may immediately initiate its activity without any further constraints.

This regime will not apply if the entity requires rights of usage over frequencies or numbers. In this case, a previous decision from ANACOM will be necessary so as to allow the interested operator to start activity. The time-frame for the attribution of rights of usage over numbers or frequencies depends on the type of resources, but it should take between 15 and 30 days.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The use of spectrum frequencies and number allocation depends on the attribution of individual rights of use, which shall be conducted by ANACOM.

The attribution of spectrum frequencies depends on the type of frequency and can be performed through procedures of direct acquisition, public tender and auction. All frequencies and their respective types are listed in the National Frequency Allocation Board (QNAF).

The right to use the frequency is granted for a 15-year period, renewable for an equal period of time. The payable fees depend on the form of attribution.

Regarding mobile networks, 2G (GSM) and 3G (UMTS) were granted by means of tender offer, and 4G (LTE) was granted by auction.

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 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).

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The applicable law is mainly the Portuguese Code of Expropriations, approved by Law n.º 168/99, of 18 September.

Whether the land at stake is public or privately-owned, pursuant to Article 1 of the abovementioned Law, the corresponding rights and assets may be expropriated in case of public utility, insofar as a fair compensation is awarded to the rightful owner for the loss of property/use of the land. Any act of expropriation (which is an administrative act), in addition to complying with the protected public interest, shall be in accordance with the constitutionally protected principles of proportionality, legality, justice, equality, impartiality and good faith – Article 2 of the Code of Expropriations. The decision to expropriate a publicly-owned land must follow the directives set in Article 6 of the Code of Expropriations. It is noteworthy that the right to a fair compensation is as enforceable when a public land is at stake as when a private one is in question. The decision to expropriate must be justified by a declaration of public utility, which must itself be published in the appropriate forum (according to Articles 10–17 of the Code of Expropriations).

The right to a fair compensation is key in this process and is set in Article 23 of the Code of Expropriations. The value of such a compensation is determined pursuant to Articles 25–31 of the abovementioned Code and takes into account, alongside other things, the type of soil of the land in question, and the use that have may have been made of it by the original owner – agriculture, farming, etc.

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Pertaining, in particular, to the installation of Telecommunications infrastructure, Decree Law n.º 123/2009, of 21 May, which defines the legal standards for the construction, access to and the installment of electronic communications infrastructure, may also be applicable.

In addition, through subsidiarity, one may still take into account the relevant provisions relating to safety and protection of human life set forth in the Regulatory Decree (*Decreto Regulamentar*) n.º 1/92, of 18 February. This bill establishes the basic safety standards to be taken into account by interested parties in the installment and maintenance of High Tension Power Lines.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The Electronic Communications Law contains a general provision on interconnection and access. It states that operators may freely negotiate access and interconnection conditions and have the right to request interconnection from other operators.

ANACOM may impose specific obligations with regard to interconnection and access, particularly on dominant undertakings, and also require certain operators to publish standard interconnection conditions and regulate prices.

Interconnection or access disputes may be submitted before ANACOM for an administrative decision. In general, ANACOM's decision should be issued within the four months following the request and will be binding, although it may be challenged before a court of law.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

As far as we are concerned, only MEO has to publish standard conditions and prices on interconnection.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Please see question 2.9.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

MEO is subject to accounting separation obligations in several markets where it has significant market power. This obligation was imposed by ANACOM according to *ex ante* regulation mechanisms.

The remedy of functional separation is included in the Electronic Communications Law, but it has never been applied. Moreover, the measure of legal separation is not provided for in the specific telecom legislation, although the ADC may apply this measure when analysing specific merger operations.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

There is a government policy to promote internet and broadband penetration. Government Resolution No 112/2012 of 31 December (amended in 2015) approved the Digital Agenda. One of the key action areas is promoting fixed and mobile broadband penetration. Until 2020 the Government objective is, amongst other things, to: (i) improve access conditions for the general population to broadband Internet above 30 Mbps; and (ii) improve mobile broadband coverage in 480 parishes.

Before the approval of the Digital Agenda, the Portuguese Government launched in 2009 five public procedures for the deployment of optical fibre NGN (Next Generation Networks) in remote or rural areas of the country, as previously mentioned.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Currently, and in general, retail prices are not regulated. However, the provision of services under the universal service legal framework, namely fixed voice telephone services, are subject to a price control mechanism, under which a variation of prices above CPI (Consumer Price Index) of -2.75% is not allowed.

As for mobile services the same principle applies.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

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:

(a) the services provided;

(b) the minimum service quality levels offered;

(c) information as to whether or not access to emergency services is provided;

(d) details of prices;

(e) the payment methods offered and the charges or penalties potentially incurred from said method;

(f) the duration of the contract and the conditions whereby the contract or services may be renewed, suspended or terminated;

(g) explicit indication of the subscriber's willingness in respect of the inclusion or not of their respective personal information in a public directory; and

(h) the type of action that might be taken by the provider in reaction to network security or integrity incidents.

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Regarding the duration of the contract, the Electronic Communications Law (as amended by the 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 concludes that consumers may not exceed 24 months, unless in specific cases, such as customer consent and equipment actualisation.

In parallel with the telecoms regulation, customer terms and conditions are also subject to the boilerplate agreement regime, approved by Decree-Law No. 446/85, of 25 October, and general consumer protection regulations.

The providers are obliged to communicate the 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.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The provision of electronic communications networks and services is subject to a general authorisation regime, without the need for any prior decision or act of ANACOM. According to this procedure, any entity intending to provide electronic communications or network services is required to submit to ANACOM a short description of the services it wishes to provide, together with the details required, and give notice of the estimated date of the activity entering into operation. In certain cases, a separate request for usage rights for frequencies and numbers must be submitted to ANACOM, which will then grant those rights in accordance with the National Numbering Plan. The decision on the allocation of usage rights will be adopted, notified and made public within a specified period of time.

2.17 Are there any special rules which govern the use of telephone numbers?

The Electronic Communications Law states that the right to use numbers are attributed to companies that offer or use electronic telecommunication networks or services. Those rights are allocated by open, objective, transparent, non-discriminatory and proportionate procedures.

As a general rule, the rights to use numbers are awarded by ANACOM within 15 days after the submission of the request by the operators. In the case of rights of use for numbers of exceptional economic value, ANACOM can grant them through competitive or comparative selection procedures, including by tender or auction.

All providers of publicly available telephony services (i.e., both fixed and mobile) must offer number portability and are obliged to cooperate in order 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.

2.18 Are there any obligations requiring number portability?

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. Most requests are accepted, as the former provider can deny portability only in very restricted cases.

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 the relevant number.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

ANACOM is responsible for the regulation of the radio-electric spectrum, as established in Article 15 of the Electronic Communications Law (Law n.º 5/2004 of 10 February).

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

ANACOM plans frequencies and assigns them, according to transparency, non-discriminatory and proportionality criteria.

In this context, ANACOM is responsible for publicising and updating the National Frequency Allocation Plan (QNAF – *Quadro Nacional de Atribuição de Frequências*), with the purpose of disseminating the use of spectrum and the application in Portugal of international agreements in this area. This publication, which is based on agreements at a national and international level, contains the spectrum allocations for the various radio services applicable in Portugal, as well as the detail of used and planned services and systems, without the prejudice of further decisions from ANACOM. The QNAF also contains information regarding the use of frequencies accessible or not to the public, as well as the indication of reserved frequency bands and their terms of allocation.

The use of spectrum is subject to radio-electric licensing, in accordance with Decree-Law no. 151–A / 2000, of 20 July, as amended by Decree-Law no. 264/2009, of 28 September, which presupposes the settlement of fees, and the respective amounts are set forth in the Administrative Rule (Decree no. 296-A / 2013, of October 2).

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The Portuguese Communications Institute may decide on the exemptions of licences, according to Article 9.º of the said Decree-Law.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Pursuant to Article 19º of the said Decree-Law, the use of the radio spectrum is indeed subject to the payment of fees. For the determination of the amounts, spectral, coverage and usage parameters shall be taken into account, namely:

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a) the number of stations used;
b) the frequencies or channels consigned;
c) the frequency band;
d) the bandwidth;
e) the degree of congestion in the region of implementation;
f) the economic and social development of the region of implementation;
g) the area of coverage;
h) the type of use and user; and
i) the exclusivity or the sharing of frequencies or channels consigned.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Pursuant to Article 14 the network or station licences are transferable with the prior authorisation of the ICP. The entity to which the licence is transmitted must, under penalty of nullity of the transmission, be legally entitled, in the same terms as the transferor, to exercise the public or private telecommunications activity to which they are subject, assuming all rights and obligations are inherent in the licence.

The transmission of a network licence implies the transmission of the licences of the stations that integrate it, if they exist.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

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 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:

a) the transfer or lease does not distort competition, namely owing to the accumulation of rights of use;
b) frequencies are efficiently and effectively used;
c) the 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
d) the restrictions set forth in the law in respect of radio and television broadcasting are safeguarded.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Article 54-A to 54-G of the Electronic Communications Law (as amended) 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 users and interconnected networks, at a national and international level, 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:

(i) 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;
(ii) inform the public, by the most appropriate means, of any breach of security or loss of integrity or to require operators to do so, where it determines that disclosure of the breach is in the public interest; and
(iii) once a year, submit 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.

Additionally, Law No. 109/2009, of 15 September (which transposes into national legislation the Framework Decision 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.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The legal framework applicable in Portugal does not allow the government to obtain access to or intercept private communications. Only specific criminal and legal judicial authorities may carry out this process, under very precise circumstances.

The Constitution of the Portuguese Republic, in Article 34, N0. 4 sets forth the standard rules on access to private communications. The Constitution expressly refers that interception of telephone communications can only by allowed in case of criminal investigations. Such investigations are under the responsibility of the Public Prosecutor, jointly with a criminal judge.

There are specific rules and provisions, as those set out in Law No. 9/2007 of 19 February (amended in 2014), providing the legal framework for the Portuguese Information Security Intelligence (SIS) and for the Portuguese Intelligence Services for Strategic Defense (SIED). This act does not grant powers of interception, encryption/decryption, direct access to communications or the possibility of requesting that telecom providers provide access to these communications, other than as set out in Articles 187 to 190 of the Portuguese Criminal Procedure Code; interception can only be authorised in the event of suspicion of the practice of a specific type of crime (depending on the nature of the offence and the duration of the criminal sentence).

Other than this, the interception of communications may only be performed during a state of siege or emergency (in this case, the decision to intercept communications is to be taken by the Parliament).

Should interception of communications be carried out in any other context, this would be considered illegal, a breach of the Constitution of the Portuguese Republic and would be punishable as a crime.

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Finally, please note that from a regulatory perspective there are no substantial differences between VoIP and the traditional voice over the PSTN (Public Switched Telephone Network) and, thus, VoIP operators and PSTN operators should be treated equally.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Please see question 4.2 above.

4.4 How does the state intercept communications for a particular individual?

Please see question 4.2 above.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

In accordance with the Privacy in Communication Law, providers of publicly available electronic communications services are under an obligation to protect personal data transmitted, stored or otherwise processed, against accidental or unlawful destruction, loss, alteration, unauthorised disclosure or access. Furthermore, such providers may avoid having to notify service subscribers in case of a data breach (which can adversely affect the subscriber or user data) if they are able to demonstrate to the relevant authorities that they have implemented measures to render the data unintelligible to any person who is not authorised to access it.

Electronic communications service providers providing encryption features must ensure, at their expense, that they also have decryption or decoding means (Article 27, No. 17, of the Electronic Communications Law), in order to ensure that access to information in the context of a criminal procedure, whenever applicable, is possible and may be carried out as ordered by the relevant authorities.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

The Law No. 32/2008, of 17 July (Data Retention Law), which transposed the Directive 2006/24/EC of the European Parliament and of the Council, sets forth that electronic communications services providers are obliged to retain customer and traffic data for a one-year period from the time of completion of the communication.

However, please note that the EU Court of Justice declared the invalidity of Directive No. 2006/24/EC of the European Parliament and of the Council (the Data Retention Directive), as it was considered to entail "a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary". This being said, as this Law was set up as a consequence and for the transposition of a Directive which has now been declared invalid, whilst the Law is currently formally valid, the reasoning behind the law is now inexistent. This issue has already been addressed in other Member States, where operators have expressly stated that they would cease to retain data, considering that this obligation had been deemed too intrusive on an EU level. Whereas in Portugal, a formal decision to repeal the Law has not yet been made, the duty to retain the data has now been questioned and operators may choose to take a stance in this respect.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is regulated by the Portuguese Media Regulation Authority (*Entidade Reguladora para a Comunicação Social* – "ERC"). ERC is a legal body governed by public law, as an independent administrative entity. All the entities which, under the jurisdiction of the Portuguese State, continue to be considered activities of media, are subject to the supervision of the ERC.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Advertising on the internet is mainly governed by general rules inserted into the Portuguese Advertising Code (Decree-Law No. 330/90, 23 October 1990, last amended by Decree-Law No. 66/2015, 29 April 2015); Law No. 7/2004, 7 January 2004; the Civil Institute for Self-Regulation of Commercial Communication (ICAP) Code of Conduct on advertising and other forms of commercial communication; and the Digital Marketing and Online Behavioural Advertising Good Practices Guide of ICAP.

The general prohibition on misleading advertising (Portuguese Advertising Code and Decree-Law No. 57/2008, 26 March 2008, on unfair practices in the relation with the consumer) is also applicable to online advertising.

Any person, including competing traders with a legitimate interest in opposing the misleading advertising may bring the matter to the attention of the competent authority.

For investigation within the administrative offence procedure, the competent authority may request the advertisers to present evidence of the factual accuracy of the data inserted into the advertising. Such data are presumed inaccurate if such evidence is not presented or is insufficient.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

For the telecommunications of Television and Radio, the authorisations may only be given to companies that pursue such activities as their main corporate object.

The right to broadcast television and radio is subject to the attribution 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 attributions, which ANACOM must execute having considered the ERC's opinion. The conditioned access to television programme services that require a subscription (pay-TV) do not use the spectrum and, therefore, such broadcasting is only subject to obtaining a licence granted by the ERC.

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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.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

The Portuguese Law (namely, Law n.º 55/2012, of 6 September) does not mention the possibility of the assignment of licences.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

We are not aware of any specific court decisions on this matter. However, please note that depending on their degree of intervention in the creation and transmission of the contents, telecommunications operators and/or internet service providers, acting as providers of information society service, may be held accountable for that content, according to the Electronic Commerce Law. As a general rule, the Electronic Commerce Law sets forth, under Articles 11 to 19 of this Law, that intermediary providers (i.e. the telecommunications operators and/or internet service provider companies which allow the content to be carried out over their network) are not required to monitor and oversee the information spread or stored over their network, or to investigate possible illicit acts practised in this scope.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

As a general rule, all telecommunications operators and/or internet service providers are required, in particular, to inform authorities immediately when they become aware of illicit activities being carried out through their services and to carry out all decisions aimed at preventing or terminating an infraction, namely by removing or making it impossible to access certain information.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Portuguese law does not set forth any specific net neutrality requirements.

The principle arising from Directive 2002/22/EC (Article 1, No. 3) on net neutrality is very broad and does not require or prohibit an internet service provider from managing traffic on their networks. In any case, ANACOM has the power to impose minimum quality requirements in order to prevent the blocking or the slowdown of traffic.

The Regulation (EU) 2015/2120 of the European Parliament and of the Council, of 25 November 2015, establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights. This regulation imposes an obligation to internet services providers (ISPs) 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 (BEREC) sought to clarify the rules of Regulation (EU) 2015/2120, by publishing in August 2016 some guidelines on the implementation by National Regulators, including ANACOM, of European Net Neutrality Rules.

In accordance with this regulation and guidelines, zero-rating is not prohibited. However, a zero-rating offer where all applications are blocked once the data cap is reached out 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 any impending network congestion.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Telecommunications operators and/or internet service providers must block access to sites/content whenever: (i) they are aware of a clearly illicit activity or information associated thereto; or (ii) the illicit nature is clear and manifest, taking into account the nature of the information provided through the network and the associated circumstances.

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Chapter 24

Russia

Semion Melnitsky

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

According to TMT Consulting, the size of the Russian telecommunications market in 2015 reached RUB 1,674bn, which represents the market's annual growth of 2.1% compared to 1.7% in 2014 according to analysts (www.tmt-consulting.ru).

Key telecoms market players are: MTS (30.7% market share by subscribers in Russia in 2015); MegaFon (29.7% in 2015); and Vympelcom (23.7%).

The local telecoms sector in general is rather competitive. However, in areas such as landline telephony, there is less competition, with Rostelecom holding a 61.9% market share (http://www.rostelecom.ru). Internet and audio-visual media are among the areas of high competition.

Foreign investments in the sector are subject to local laws and regulations governing mass media, broadcasting, encryption, natural monopolies, and protection of competition.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

Russia's telecommunications and Internet industries are governed by the following statutes:

- Federal Law No. 126-FZ, dated 07 July 2003, "On Communications" (the "Law on Communications");
- Federal Law No. 152-FZ, dated 27 July 2006, "On Personal Data Protection"; and
- Federal Law No. 149-FZ, dated 27 July 2006, "On Information, Information Technologies and Protection of Information" (the "Law on Information").

The telecommunications and Internet industries are also governed by various associated by-laws and standards.

Russian audio-visual media distribution is governed by Law of the Russian Federation No. 2124-1, dated 27 December 1991, "On Mass Media" (the "Law on Mass Media") and the Civil Code of the Russian Federation (when it comes to intellectual property rights regulation).

The provisions of the applicable regulations, especially by-laws and standards, are sometimes unclear, conflicting and subject to rapid change.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The official bodies having general authority to regulate these areas include: the Russian Federal Assembly (consisting of two chambers: the State Duma and the Federal Council); the Russian Government; and the President. Also, there are regulators with special regulatory and supervisory powers: the Ministry of Telecommunications and Mass Communications (Minkomsvyaz – telecoms and Internet regulator); the Federal Service for Supervision of Telecoms, Information Technologies and Mass Communications (Roskomnadzor – supervisory body); the Federal Agency for Communications (Rossvyaz – in charge of public services in the telecoms sector); and the Ministry of Culture of the Russian Federation (certain powers related to audio-visual media distribution).

The Federal Antitrust Service has been granted wide powers and plays a special role in ensuring competition in the mentioned areas.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

There are special restrictions applying to investments into so-called strategic companies pursuant to the Federal Law "On the Procedure for Foreign Investments in Business Entities of Strategic Importance to Ensure National Defence and State Security".

According to the Federal Law, strategic companies are companies that (*inter alia*):

- carry out television broadcasting in the territory with a population amounting to half or more than half of the population of a region of the Russian Federation;
- carry out radio broadcasting in the territory with a population amounting to half or more than half of the population of a region of the Russian Federation;
- are editors and/or publishers and/or founders of printed periodicals if the total number of their products in circulation published within a year preceding the transaction (in question) amounts to not less than:
  a) 15 million copies coming out with a frequency of two or more times a week;
  b) 2.5 million copies circulated once a week, once a fortnight or once in three weeks;

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c) 700,000 copies circulated once a month or every other month; and

d) 300,000 copies circulated once a quarter, or less frequently;

- participate in the development and production of encryption (cryptographic) means and encryption-protected information and telecommunication systems (most major players in the Russian telecoms market are licensed to carry out such activities);
- are natural monopolies (i.e. entities providing telecommunication and postal communication services to the general public; currently Rostelecom and the Russian Postal Service); and
- are included in the Federal Antitrust Service register, have a dominating position and carry out the following activities:
  - offer landline telephone services in territories comprising five or more regions of the Russian Federation; and
  - offer landline telephone services within the geographical boundaries of federal cities.

According to the Federal Law, all transactions with the participation of foreign investors holding 25% or more of shares of the above-mentioned companies are subject to approval by the Federal Antitrust Service.

There are tight restrictions that apply to the acquisition of shares in mass media companies.

The Law on Mass Media sets out restrictions for the acquisition of mass media by:

- foreign states;
- international organisations;
- organisations under their control;
- foreign legal entities;
- Russian legal entities in which foreign shareholders own more than 20% of the authorised capital;
- foreign citizens; and
- citizens of the Russian Federation who are also foreign citizens.

The above-mentioned persons are not entitled to possess, manage or control, directly or indirectly (including through controlled persons or by holding (in the aggregate) more than 20% of shares of any person), more than 20% of shares in the authorised capital of an entity being a participant (member, shareholder) of a founding entity of a mass medium, an editorial medium, or an organisation (legal entity) conducting broadcasting activities.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Russia has been a member of the WTO since 22 August 2012. The Russian Federation made horizontal and sector-specific commitments under the GATS in the area of telecommunications. The country is yet to implement the WTO Basic Telecommunications Reference Paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Russia's telecoms networks and services are governed by federal laws on communications, personal data, information, information technology and information protection, as well as by numerous associated by-laws and standards.

The provisions of the applicable regulations, especially by-laws and standards, are sometimes unclear, conflicting and subject to rapid change.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The official bodies having general authority to regulate these areas include the Russian Federal Assembly (consisting of two chambers: the State Duma and the Federal Council), the Russian Government and the President. Also, there are regulators with special regulation and supervision powers: the Ministry of Telecommunications and Mass Communications (Minkomsvyaz – telecoms and Internet regulator); the Federal Service for Supervision of Telecoms, Information Technologies and Mass Communications (Roskomnadzor – supervisory body); and the Federal Agency for Communications (Rossvyaz – in charge of public services in the telecoms sector).

The Federal Antitrust Service has been granted wide powers and plays a special role in ensuring competition in the mentioned areas.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Russian federal laws and resolutions of the Russian Government and the President may be challenged in the Russian Constitutional Court if these acts do not comply with the Russian Constitution. Resolutions and by-laws of the Russian Government, the President, the Ministry of Telecommunications and Mass Communications and other federal regulatory bodies may be challenged in the Russian Supreme Court.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Telecom companies are subject to licensing requirements in order to provide telecom services. Telecom companies that use the radio-frequency spectrum need to obtain a special permission from the State Commission for Radio Frequencies.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

According to the Federal Law on Communications, the services of telecom companies may be provided only on the basis of a telecom licence. The list of communication services requiring licences and the lists of licensing conditions are established by the Government of the Russian Federation and are updated annually.

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For example, the following licensing conditions are established for mobile operators:

- compliance with the timeframe within which the licensee may provide services;
- observance of the date of commencement of the services specified in the licence;
- provision of services in the territory specified in the licence;
- providing the following services to subscribers:
  a) access to communications networks;
  b) connection through mobile networks for the reception (transfer) of voice and non-voice information ensuring communication continuity while rendering services irrespective of the location of the subscriber, including while the subscriber is moving;
  c) calls to landline telephone subscribers and/or users of public telecommunications network;
  d) the possibility of using mobile radiotelephony communications when roaming outside the territory specified in the licence (only mobile radio telephone communication networks operating under NMT-450, GSM 900/1800, and IMT-MC-450 standards);
  e) access to telematic communication services and data transmission services;
  f) information services;
  g) free round-the-clock emergency calls; and
  h) transmission of emergency alerts and information on threats posed by natural or industrial disasters;
- compliance in the provision of services with the rules of rendering communication services adopted by the Government of the Russian Federation;
- compliance with the rules governing the interconnection and interaction of telecommunication networks;
- performance by a licensee of its obligations undertaken under the competitive bidding (auction, competition) to obtain a licence;
- compliance with the conditions established as part of the allocation of radio frequencies and assignment (appointment) of radio frequencies or radio frequency channels;
- compliance with specific requirements for networks and means of communication for operational search purposes; and
- providing information on payments to the Universal Service Fund.

There are also detailed requirements applying to other types of telecom services.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Licences may be issued for a term of three to 25 years, which is set by the licensing authority, taking into account:

- the period specified in the licence applicant's statement;
- the composition of communication services;
- the term of allocation of radio frequencies; and
- the technical restrictions and technological conditions in accordance with the rules applying to telecommunication networks connection and their interaction.

The licence may be issued for a period of less than three years upon the application of the licence applicant.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

According to the Russian Land Code, a contract for the lease of a land plot under state or municipal ownership may be concluded without a tender in instances where land is provided to legal entities for accommodating telecommunications facilities.

Land plots for telecommunications infrastructure may be provided through creating easement.

Russian legislation allows for the establishment of security zones within land plots containing telecommunications infrastructure.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Telecom operators and owners of special-purpose communication networks have the right to connect their networks to public telecommunication networks. The connection of two telecommunication networks to one another and their interaction is carried out on the basis of network interconnection contracts entered into between operators and owners of communication networks.

Under a network interconnection contract, operators of public communication networks are obliged to provide connection services to other operators in accordance with the rules governing the interconnection and interaction of telecommunication networks, as approved by the Government of the Russian Federation.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Pursuant to the Law on Communications, landline telecom operators with a significant position in the public communication network (defined as those having (together with their affiliates) no less than 25% of the installed capacity or the ability to carry and transmit at least 25% of traffic within a geographically defined numbering area, or within the entire territory of the Russian Federation (the "Significant Operators")) are required to publish their standard interconnection contracts and prices defined by the Federal Communications Agency (Rossvyaz).

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The pricing model approved by Rossvyaz sets upper limits for prices charged by Significant Operators.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

If a landline telecom operator (other than a Significant Operator) sets prices for call termination on its network for a Significant Operator that exceed the Significant Operator's prices for similar services,

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the Significant Operator would include compensation in each billing period in addition to the total amount charged for the interconnection services. The amount of compensation is calculated as the price difference multiplied by the volume of the interconnection services provided to the Significant Operator.

In addition, there are certain indirect tariff regulation measures applicable to all telecom operators under the antitrust laws.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

This answer was not available at the time of publication.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Tariffs for communication services are set by operators independently, unless otherwise stipulated by the Federal Law and the legislation of the Russian Federation on natural monopolies.

If a telecoms operator imposes prices that are too high, it may then be subject to antitrust proceedings.

Tariffs for public telecommunications services (e.g. local telephone services) and public postal communications (e.g. forwarding of internal written correspondence (postcards, letters, parcels)) are subject to state regulation. The list of public telecommunications services and public postal services, tariffs for which are regulated by the state, as well as the applicable regulation procedures are established by the Government of the Russian Federation. Tariffs for universal services are also subject to regulation.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The provision of electronic communications services to consumers is over-regulated. Under the Federal Law on Communications, this area is regulated by special by-laws issued by the Russian Government. Each type of electronic communications service is governed by a separate by-law. For example, the Rules on Providing Telephone Services regulate the relationships between the subscriber or user of telephone services and the telecoms operator providing services of local, intra-zone, long-distance and international telephone communications in the public communications network, as well as mobile radio communications services, mobile radiotelephony communications services and mobile satellite telecommunications.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The Federal Communications Agency (Rossvyaz) has the right to change, modify, withdraw all or part of the numbering resource allocated to the operator in question.

The allocation of numbers is carried out by Rossvyaz at the operator's request within a period not exceeding 60 days if the numbering volume allocated to all operators in the particular area is less than 90% of the available resource.

The operator may only transfer the allocated numbering resource or part thereof to any other operator subject to Rossvyaz's consent.

2.17 Are there any special rules which govern the use of telephone numbers?

Under the Federal Law on Communications, the use of telephone numbers is governed by the following by-laws:

- the Resolution of the RF Government "On the Approval of the Rules for Distribution and Use of Numbering Resources of the Unified Telecommunications Network of the Russian Federation"; and
- the Order of the Ministry of Communications "On the Approval and Introduction of the Russian Numbering System and Plan".

2.18 Are there any obligations requiring number portability?

Mobile operators are obliged to provide mobile portability for their subscribers.

The subscriber has the right to keep his/her number when switching to another mobile operator within the territory defined by the Government of the Russian Federation. The subscriber is required to terminate the existing communication services contract, repay any overdue communication service fees and enter into a new contract for the provision of communication services with such other mobile operator.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The State Radio Frequencies Commission is an inter-agency coordinating body under the Ministry of Telecom and Mass Communications granted full authority to regulate the radio spectrum. The State Radio Frequencies Commission makes decisions to allocate the spectrum for commercial use.

The Federal Service for Supervision of Communications, Information Technology, and Mass Media (Roskomnadzor) is specifically authorised to control the proper use of radio frequencies and radio electronic equipment.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

The State Radio Frequencies Commission makes decisions to allocate the spectrum for commercial use. After that, Roskomnadzor organises an auction (bidding) and, based on the results of such auction, allocates appropriate frequency ranges to the winners and issues relevant licences.

Roskomnadzor also assigns frequencies, i.e. grants the right to use certain radio frequencies or radio frequency channels within the specified territory with no interference to other spectrum users.

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Roskomnadzor also registers radio-electronic appliances and high-frequency devices to be used under authorised power limits.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The State Radio Frequencies Commission has adopted decisions on the possibility of using frequencies within the 5 GHz range for Wi-Fi technology without a licence.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The licence fee is 10,000 roubles.

Roskomnadzor also collects a one-off fee for the allocation of radio spectrum and annual fees for the use of radio frequencies with respect to each radio spectrum authorisation using the fee calculation methodology developed by the Ministry of Telecom and Mass Communications.

Fees collected from all organisations using radio frequencies total approximately 15bn roubles per year.

In addition, prior to the assignment of radio frequencies, organisations are subjected to a rather costly procedure for the evaluation of electromagnetic compatibility of radio-electronic devices.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

A change of control over the holder of an authorisation to use the radio spectrum does not affect the relevant authorisation.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

In the case of reorganisation of a radio frequency user and provided that it files an appropriate application to that effect, the State Radio Frequencies Commission can make a decision to transfer the right to use the radio spectrum to another user. No sub-licensing or trade of spectrum authorisations is possible. However, there is a right to establish MVNO, which is very similar to sub-licensing.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

This answer was not available at the time of publication.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

- Federal Law No. 144-FZ, dated 12 August 1995, "On Investigative Activity".
- Federal Law No. 35-FZ, dated 06 March 2006, "On Counter-terrorism".
- Federal Law No. 126-FZ, dated 07 July 2003, "On Communications".
- Federal Law No. 149-FZ, dated 27 July 2006, "On Information".
- Rules approved by the Resolution of the Government of the Russian Federation No. 538, dated 27 August 2005, "On the Approval of the Rules of Cooperation between Telecommunication Operators and Authorised State Bodies for Operational Search".
- Rules approved by Resolution of the Government of the Russian Federation No. 743, dated July 31, 2014, "On the Approval of the Rules of Cooperation between Internet Operators and Authorised State Bodies for Operational Search or National Security Protection".

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

In accordance with Article 8 of the Law on Operational Search, any state body for operational search may seek a court's permission to intercept a person's private communications. The court would grant a permission for such interception activities where the state body has evidence that: (i) a crime has been or may be committed and the interception will assist with the investigation; (ii) the person whose communications are to be intercepted is preparing to commit or has committed a crime and the interception will assist with the investigation; or (iii) there is evidence of a threat to national security.

According to Article 64 of the Law on Communications, an operator of any licensed telecommunications network or a telecommunication services provider is obliged to provide assistance to state operational search bodies in accordance with the provisions of the Russian criminal law at its own expense. Such assistance includes the provision of factual information of traditional telephone calls, VoIP calls, emails, messages and data traffic, including Internet traffic.

It is worth noting that on 7 July 2016, the President of the Russian Federation signed the Law "On Additional Measures against Terrorism", authored by Irina Yarovaya and Viktor Ozerov.

In accordance with this Law, starting from 20 July 2016:

- telecom operators are required to keep (within the territory of the Russian Federation) information on transmission, delivery and/or voice information processing of text messages, images, sounds, video, or other user messages for three years;
- Internet operators are required to keep the same information for one year from 1 July 2018; and
- telecom and Internet operators are required to keep (within the territory of the Russian Federation) text messages to users of communication services, voice, data, images, sounds, video and other communication users of communication services for up to six months.

The procedures, timelines and storage volumes are to be set by the Russian Government.

4.4 How does the state intercept communications for a particular individual?

Under Article 8 of the Law on Operational Search, state bodies for operational search may access data held by licensed operators of telecommunications networks as part of their operational search efforts. The Law of Operational Search requires state bodies for operational search to apply to a court for permission to intercept a person's private communications.

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4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Federal Law No. 128-FZ, dated 8 August 2001, "On Licensing of Certain Types of Activities" sets out general licensing procedures for activities involving: (i) the development and distribution of encryption (cryptographic) tools; (ii) technical maintenance of encryption (cryptographic) tools; (iii) the provision of data encryption services; and (iv) the development and production of encryption (cryptographic) tools and encryption-protected information and telecommunication systems.

In addition to the above-mentioned Law, the Russian Government passed Resolution No. 587 "On Licensing of Certain Activities Associated with Encryption (Cryptography)" which establishes specific encryption licensing requirements. They cover hardware, software, algorithms, production techniques, etc. The licensing authority in charge of this area is the Federal Security Service of the Russian Federation.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

In accordance with the amendments introduced to the Law on Communications, starting from 20 July 2016, telecoms operators are required to keep (within the territory of the Russian Federation) information on transmission, delivery and/or voice information processing of text messages, images, sounds, video, or other user messages for three years. From 1 July 2018, telecom and Internet operators will be required to keep (within the territory of the Russian Federation) text messages to users of communication services, voice, data, images, sounds, video and other communications of users of communication services for up to six months.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is governed by the Civil Code, the Law on Mass Media and the Law on Information. Such distribution is also subject to licensing under applicable Roskomnadzor regulations.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

The regulation for traditional distribution platforms differs from the regulation for content delivered over the Internet. There are different rules for Internet advertising and traditional advertisements via mass media. As a rule, TV and radio advertisements are subject to tighter rules.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

There are four types of licences for the distribution of audio-visual media issued by official bodies:

1) Broadcasting licences.
2) Licences issued to telecom service providers for the purposes of air broadcasting.
3) Licences issued to telecom services for the purposes of cable broadcasting.
4) Licences issued to telecom service providers for the purposes of wired radio broadcasting.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Broadcasting licences are assignable. There are certain restrictions on the change of control as refers to the mass media regulation.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

A person transmitting materials through a telecommunication network, including the Internet, a person using an information and telecommunications network to enable the placement of materials or information necessary for their receipt, and a person providing access to the materials in this network, the information intermediary, are liable for violation of intellectual property rights in the telecommunications data network on the general grounds stipulated by the Civil Code, if found guilty.

However, an information intermediary is not liable for any breach of intellectual property rights that occurred as a result of content distribution, if the following conditions are met:

1) it does not initiate such distribution and does not determine the content's recipient;
2) it does not alter the materials when providing connection services, with the exception of modifications necessary to ensure the technological process applied in the transmission of such materials; and
3) it neither knew nor should have known that the use of the relevant intellectual property or means of individualisation by the person who initiated the transmission of the materials containing the corresponding intellectual property or means of individualisation acted illegally.

An information intermediary that enables the placing of materials in a telecommunications network is not responsible for breach of intellectual property rights occurring as a result of such material being placed in the network by or on instructions of a third party, provided that the information intermediary meets the following conditions:

1) it neither knew nor should have known that the use of the relevant intellectual property or means of individualisation contained in such material was unlawful; and
2) it has promptly taken reasonable steps to stop the infringement of the intellectual property rights upon receipt of a written statement by the copyright holder alleging breach of its intellectual property rights with references to the website pages and/or the network address on the Internet that hosts such material.

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6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

If a right holder discovers materials contained in a telecommunication network (including the Internet) that are protected by his/her/its copyright and/or related rights, where such materials are distributed within such network without his/her/its permission or other legal grounds, the right holder may apply to Roskomnadzor requesting that measures be taken to restrict access to the information resources distributing such materials under a valid court ruling.

If the website owner or the hosting provider does not limit access to such materials or does not delete them, Roskomnadzor should request telecom operators to block access to the websites that contain such "pirate" content. The websites that repeatedly breach intellectual property rights may be blocked for an indefinite period of time.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

This answer was not available at the time of publication.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Telecom operators are bound by the obligation to block websites that infringe intellectual property rights (see above). Telecom operators must also block websites containing prohibited information and those that are included in the special register maintained by Roskomnadzor. Websites are included in the register upon a decision of authorised public bodies or state courts. The following information is regarded as prohibited:

a) pornographic materials containing images of minors;

b) information on methods of manufacture and use of narcotic drugs, psychotropic substances and their precursors;

c) information on how to commit suicide;

d) information about minor victims of criminal acts (omissions to act); and

e) information about the organisation and conduct of gambling business.

Extremist materials or calls for mass riots must be blocked immediately upon the decision of the Prosecutor General (and his/her deputies). The decision is then passed on to Roskomnadzor which notifies telecoms operators.

There is no obligation to block VPN services.

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Melnitsky & Zakharov, Attorneys-at-Law, was established on the basis of the renowned Iniurcolleguia, Attorneys-at-Law and focuses on expert legal support and judicial protection for businesses.

Melnitsky & Zakharov specialises primarily in the resolution of complex commercial and administrative disputes involving entities engaged in telecommunications, metallurgy, oil & gas, gold-mining, major development and construction projects, transportation and investment. We have successfully represented our clients at the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation, as well as at leading international arbitration institutions.

Over the past 15 years, Melnitsky & Zakharov has developed and maintained successful practices in Corporate Law, Development & Real Estate, Competition Law, Maritime Law and Museum Law.

Our clients include major Russian and international corporations that are recognised industry leaders, such as: MegaFon; Rostelecom; Severstal; Russian Railways; Gazprom; Polyus Gold; and many others.

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Singapore

OrionW LLC

Winnie Chang

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

In October 2016, the Media Development Authority and the Info-communications Development Authority merged to form the Info-communications Media Development Authority (**IMDA**). This merger enables the IMDA to develop and regulate the converged infocomm and media sectors in a holistic way. According to the *Annual Survey on Infocomm Industry for 2015* of the Info-communications Development Authority of Singapore (the IMDA's predecessor), the total infocomm industry revenue for 2015 was almost S$190 billion, approximately 28% of which was attributable to the domestic market. Singapore's vision for developing the infocomm and media sectors is set out in the *Infocomm Media 2025* report.

There are currently three major telecommunications service providers in Singapore: Singtel, StarHub and M1. A fourth player, TPG Telecom, recently won a spectrum auction for the provision of 4G services and is expected to begin operations in mid-2018.

In broadcasting, Mediacorp is the sole broadcast licensee for free-to-air television channels in Singapore. StarHub and SingTel offer pay-TV services to the general population in Singapore. The principal free-to-air radio broadcasters are Mediacorp, Singapore Armed Forces Reservists' Association and SPH Radio.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) The Telecommunications Act (**TA**) is the principal legislation governing the telecoms sector in Singapore. Other relevant legislation includes the Info-communications and Media Development Authority Act 2016 (**IMDAA**), the Personal Data Protection Act 2012 (**PDPA**), the Spam Control Act and the Electronic Transactions Act. In addition, the IMDA has issued a number of codes and guidelines, including the Code of Practice for Competition in the Provision of Telecommunication Services 2012 (**TCC**), the Code of Practice for Info-communication Facilities in Building (**COPIF**) and the Internet Code of Practice (**ICP**). The Computer Misuse and Cybersecurity Act (**CMCA**) and the Copyright Act are also key legislation for the internet sector.

(b) Key legislation applicable to the audio-visual media distribution sector includes the Broadcasting Act (**BA**), the IMDAA, the Films Act, and the Copyright Act. The relevant codes of practice include the Code of Practice for Market Conduct and IMDA's codes for TV broadcast, radio and film.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The IMDA is the regulator for both the telecommunications (including internet) and media sectors in Singapore. The IMDA is a statutory board under the supervision of the Ministry of Communications and Information (**MCI**), the government ministry in charge of the development of the infocomm technology, cyber security, media and design sectors in Singapore.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The telecoms sector in Singapore was fully liberalised in April 2000. The IMDA specifies separate licensing requirements for facilities-based operators (**FBO**) and services-based operators (**SBO**). There are no foreign ownership restrictions on FBO or SBO licensees. However, an FBO licensee must be incorporated under the Singapore Companies Act. An SBO licensee must be a company incorporated or a foreign company registered under the Singapore Companies Act (or a Singapore limited liability partnership or limited partnership).

The BA imposes various restrictions on holdings in licensed broadcasting companies. No person may become a 12% controller or an indirect controller of a licensed broadcasting company without first obtaining ministerial approval.

Similarly, unless the Minister for Communications and Information (**Minister**) otherwise approves, no company shall be granted a broadcasting licence where:

- a foreign source holds at least 49% of the shares in, or controls the voting power of at least 49% of, that company or its holding company; or

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- all or a majority of the persons controlling or managing that company or its holding company are appointed by or act in accordance with the directions of any foreign source.

Further, unless the IMDA approves otherwise:

- receipt of foreign source funds for the purposes of financing any broadcasting service owned or operated by a broadcasting company is prohibited; and
- a licensed broadcasting company's CEO and at least one half of its directors must be Singapore citizens.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Singapore became a member of the World Trade Organisation on 1 January 1995. Singapore has made commitments, including in relation to market access and transparency, under the GATS in relation to telecommunications and has adopted and implemented the telecoms reference paper on regulatory principles.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision or operation of telecoms networks or services in Singapore requires a licence under the TA. See the response to question 2.7 for details on licensing requirements.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The IMDA is the regulatory authority primarily responsible for telecoms-related competition issues, to the exclusion of the Competition Commission of Singapore.

Although the IMDA relies primarily on market forces and industry self-regulation to prevent anti-competitive behaviour, minimum requirements relating to competition issues are prescribed under the TCC.

The TCC is enforced by the IMDA (rather than by private individuals bringing actions against operators). The IMDA is a statutory board under the supervision of the MCI.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Licensees who disagree with (i) a decision of the IMDA issued pursuant to the TA, or (ii) anything contained in any code of practice, standard of performance or direction of the IMDA given under the TA, may request that the IMDA reconsiders the matter or file an appeal to the Minister.

The same matter cannot simultaneously be the subject of a reconsideration request to the IMDA and an appeal to the Minister. However, a licensee who disagrees with a decision of the IMDA following a reconsideration request may appeal to the Minister within 14 days of receiving the IMDA's decision.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The licensing requirements under the TA distinguish between FBO and SBO. FBO refers to the infrastructure and systems associated with telecommunications services. SBO relates to the provision of telecoms services in Singapore. There are also separate authorisations required for spectrum use and radio-communication equipment operation.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

See the response to question 2.7.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

An entity wishing to operate any form of telecoms network, system or facility to provide telecoms and/or broadcasting services outside its own property to third parties will require an FBO licence. The IMDA adopts a technology-neutral approach to the technology an applicant may choose to deploy in its operations. Should a licensee subsequently wish to change its network and/or service offering, it would need to seek the IMDA's prior approval. However, FBO licensees do not have to apply for an SBO licence if they wish to provide telecommunications services across their own networks. FBO licences are typically granted for 15 years and may be renewed as the IMDA deems fit.

An entity which intends to lease telecommunications network services from an FBO licensee to provide telecoms services will require an SBO licence. Two categories of SBO licence exist: individual licences and class licences. Operations requiring an SBO individual licence include public internet access services, virtual private network (**VPN**) services, IP telephony services, satellite mobile telephone or data services and mobile communications on aircraft. Operations requiring an SBO class licence include internet-based voice and data services, international calling card services and audiotex services. All SBO individual licences are valid for an initial period of five years and may be renewed for further five-year periods. There is no renewal requirement for SBO class licences once granted.

Licences may not be transferred or traded without the IMDA's prior approval.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The TA governs the erection, maintenance and repair of telecommunications installations on government-owned and private land.

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In addition, the COPIF ensures that developers and owners of buildings provide adequate space and facilities for the deployment and operation of equipment used for providing info-communication services to the buildings.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The TCC regulates interconnection and access issues. FBO licensees and SBO licensees using switching or routing equipment to provide services to the public are under a duty to interconnect with other licensees. Licensees may interconnect directly or indirectly but all interconnection agreements must be in writing and approved by the IMDA. The IMDA will generally not involve itself in interconnection negotiations where both parties are non-dominant licensees.

Licensees are under a duty to cooperate in good faith and in a commercially reasonable manner in implementing the terms of their interconnection agreements and to avoid unnecessary disputes. Any disputes should be resolved promptly and fairly. The IMDA views interconnection agreements between non-dominant licensees as private contracts and will, therefore, not intervene to resolve any disputes. The IMDA adopts a more active role in ensuring the adoption of just, reasonable and non-discriminatory interconnection agreements involving a dominant licensee (i.e. an FBO licensee classified as dominant by the IMDA) and may intervene to resolve a dispute upon request. The IMDA's Dispute Resolution Guidelines set out the procedures governing dispute resolution.

Dominant licensees are obliged to provide interconnection-related services and mandated wholesale services to other licensees, if requested to do so, through an approved reference interconnection offer (**RIO**), an existing interconnection agreement or an individually-agreed interconnection agreement.

However, FBO licensees are not required to share infrastructure they control with their competitors, except where certain infrastructure are classified as critical support infrastructure or where the IMDA finds that it would be in the public interest to do so. In such circumstances, the licensee controlling the infrastructure will be entitled to compensation for sharing it.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Dominant licensees may be required to submit a proposed RIO to the IMDA for approval. The TCC sets out the specific requirements applicable to such offers. Approved RIOs are published on the IMDA website.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The TCC specifies the pricing methodologies applicable to interconnection-related services and mandated wholesale services offered by dominant licensees under RIOs. In particular, pricing for interconnection-related services must be cost-based while the IMDA will specify pricing for mandated wholesale services, either at cost-oriented rates, at retail-minus prices based on "avoidable cost" study or at retail-minus prices based on a "proxy discount".

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The Accounting Separation Guidelines require certain telecoms licensees to undertake accounting separation. There are two levels of accounting separation:

- **detailed segment reporting**, which generally applies to dominant FBO licensees and licensees controlled by a dominant licensee, requires separate reporting of key service segments and certain individual retail services; and
- **simplified segment reporting**, which generally applies to licensees that control a dominant FBO licensee and certain other entities, requires less separation of operations and a less stringent cost allocation process.

Structural separation requirements apply to Singapore's Next Gen Nationwide Broadband Network (**NGNBN**) first layer, NetLink Trust (**NetLink**), a network entity which is responsible for the design, build and operation of the passive infrastructure (including the dark-fibre network and ducts) of the NGNBN. Under its FBO licence, NetLink Management Pte Ltd (NetLink's trustee-manager) must not have or be under the effective control of another telecoms licensee or broadcasting licensee or the same controlling entity as another telecoms licensee or broadcasting licensee.

Further, organisational separation requirements apply to NGNBN's second layer, Nucleus Connect Pte Ltd (**Nucleus Connect**), an operating company which provides wholesale network services over the active infrastructure (such as switches and transmission equipment). Nucleus Connect's FBO licence requires it to make its own decisions independently and not act under the control or influence of any affiliated operators.

These separation requirements are designed to ensure that:

- no conflicts of interest arise; and
- retail service providers, which form NGNBN's third layer and offer services over the NGNBN to businesses and consumers, are able to purchase access on a level playing field.

The Minister also has the power under the TA to issue separation orders to telecoms licensees in certain circumstances. In addition, the IMDA may require telecoms licensees to comply with separation requirements under their respective licence conditions.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Under their respective FBO licences, NetLink and Nucleus Connect are obliged to provide other service providers with open access to the NGNBN infrastructure through an Interconnection Offer approved by the IMDA or a customised agreement.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Where the IMDA determines that dominant licensees are not subject to competitive market forces, it may intervene to ensure that they provide services to end-users and other licensees on just, reasonable and non-discriminatory prices, terms and conditions.

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The TCC also prevents licensees with significant market power from using their dominant position in a market in a manner that unreasonably restricts or is likely to unreasonably restrict competition, e.g. through the pricing of services and equipment.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Public telecoms licensees are required to comply with a universal service obligation in their respective FBO licences requiring them to establish, install, maintain and operate telephone systems and provide basic telephone services to any person in Singapore who requests such services.

NetLink and Nucleus Connect are also required under their respective FBO licences to establish, install, maintain and operate specified systems and provide certain mandated services to any telecoms licensee or broadcasting licensee in Singapore who requests such services.

In addition, dominant licensees must file a tariff with the IMDA and obtain the IMDA's written approval before offering or modifying terms for providing their telecoms services. Tariffs must be published on the dominant licensees' respective websites before they begin providing the relevant services.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The IMDA controls and manages the National Numbering Plan (**NPP**), which establishes rules and guidelines for the use and assignment of numbers to telecommunications services delivered over the Public Switched Telephone Network (**PSTN**) and radio and internet-based networks. The NPP also sets out the assignment of numbers to international services, trunk service, emergency services and special services such as voice mail. The IMDA aims to ensure that the number allocation process is fair and transparent to provide a level playing field for competition.

2.17 Are there any special rules which govern the use of telephone numbers?

Under the NPP, numbers are categorised in various services according to the first digit:

- '0' for international services, such as IDD;
- '1' for special services, including operator assistance, service enquiry, internet dial-up and voice information;
- '3' for IP telephony services;
- '6' for PTSN and IP telephony;
- '8' and '9' for radio network numbers (all eight digits long); and
- '99' for three digit emergency services numbers.

2.18 Are there any obligations requiring number portability?

Fixed-line and mobile operators are required to ensure customers have the option to retain their existing numbers when switching providers.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The IMDA regulates spectrum use and has powers and functions covering the allocation and assignment of spectrum, the planning and coordination of frequency usage, the monitoring and resolution of radio frequency interference and the technical regulations to be imposed.

The Telecommunications (Radio-Communication) Regulations (**Radio-Communication Regulations**) specify the procedure and requirements for the grant of spectrum rights, the conditions for spectrum use and the frequency fees payable.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Under the TA, spectrum rights may be granted via auction, tender or allocation in exchange for fees, or through any combination of those methods.

The auction process is used for allocating spectrum for 2G, 3G, 4G and wireless broadband, as there are competing demands over the same or similar spectrum bands and competing services cannot share the spectrum. An administrative approach (i.e. comparative beauty parade) is currently adopted for paging, trunked radio and fixed link services.

The IMDA also assigns spectrum on a temporary or occasional basis (for a period not exceeding 90 days) for exhibitions, demonstrations and testing of equipment and on a shared-use, non-protection and non-interference basis. Certain frequencies have been assigned for temporary or occasional use, although the IMDA may also approve the use of other frequencies on a case-by-case basis.

In addition, until 31 December 2019, the IMDA will make the 71–76 GHz and 81–86 GHz frequency bands available for short-term use of up to 12 months for commercial wireless applications such as fixed-wireless backhaul and inter-building fixed wireless network. Any allocation of spectrum in these bands beyond 2020 will factor in recommendations from the World Radiocommunication Conference 2019.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The use of a radio transmitter that has a localised area of operation due to its low output power (generally 100mW or less) is generally exempted from licensing if certain conditions are met, including that:

- the transmitter output power is below the maximum approved field strength or power set by the IMDA; and
- the use of the device is localised.

The IMDA has also issued guidelines on the safe operation of unmanned aircraft systems (e.g. drones) for commercial and recreational purposes.

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3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The spectrum fee payable for the long-term use of radio spectrum comprises:

- a one-time Application & Processing Fee; and
- an annual Frequency Management Fee, which is based on the exclusivity of the frequency, the type of radio-communication service and the frequency band and bandwidth used.

The fee payable for the temporary use of radio spectrum generally depends on the frequency band applied for and the number of days of use.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The TA and the Radio-Communication Regulations do not explicitly state what may happen to spectrum licences if there is a change of control of the licensee. However, the IMDA has the authority to impose any condition which it considers appropriate with respect to any spectrum right granted by it. In addition, the IMDA may, in certain circumstances, vary any condition in relation to any spectrum right granted.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

A licensee may assign or otherwise deal with the whole or any part of the rights and privileges granted under its spectrum right, subject to the IMDA's written approval. In such case, the IMDA may impose conditions on the assignment, change the name of the grantee, vary the conditions attached to the spectrum right, cancel the spectrum right or issue one or more new spectrum rights.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The key Singapore legislation on cybersecurity is the CMCA. The CMCA criminalises unauthorised access to or modification of computer material, using a computer to access any computer program or data to commit an offence, interception of computer services and unauthorised disclosure of access codes. The CMCA also applies to acts committed outside Singapore if the offence causes serious harm in Singapore.

In addition, the CMCA grants the Minister of Home Affairs the power to authorise or direct anyone to take measures to prevent, detect or counter any cybersecurity threat to the national security, essential services (e.g. those related to communications infrastructure, banking, public utilities or emergency services) or defence of Singapore.

Other Singapore laws and guidelines apply to the security of electronic data, including:

- the PDPA, which imposes data security obligations on organisations; and
- sector-specific guidelines, such as technology risk management guidelines issued by the Monetary Authority of Singapore.

In July 2017, the MCI and the Cyber Security Agency of Singapore issued a public consultation paper on a draft Cybersecurity Bill to enhance the current scope of the CMCA cybersecurity provisions.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

There are various statutory provisions which authorise government agencies to obtain access to private communications under certain circumstances. Some examples are:

- **TA**: The Minister may, in certain circumstances and after consulting with the IMDA or a telecoms licensee, give the licensee directions for: (i) the taking of, the control of, or the usage for official purposes of, any telecommunications system and equipment; and (ii) the stopping, delaying and censoring of messages.
- **CMCA**: See the response to question 4.1.
- **Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA)**: Under certain conditions, access to information in data equipment may be ordered by a court where there are reasonable grounds to believe that a person has carried on or benefited from drug dealing or criminal conduct (e.g. financing terrorism, foreign tax offence or kidnapping).
- **Criminal Procedure Code (CPC)**: An authorised person investigating an arrestable offence may, by order of the Public Prosecutor, access a computer suspected of being used in connection with such offence and require any person in possession of decryption information to grant access to such information as may be necessary to decrypt any data required for the purposes of investigating such offence.
- **Electronic Transactions Act (ETA)**: Access to any computer system may be required in connection with any ETA offence and to search for any data contained in or available to such computer system.
- **Kidnapping Act**: A police officer may, under certain circumstances and by order of the Public Prosecutor, intercept messages transmitted or received by telecommunications or intercept or listen to any conversation by telephone.
- **Official Secrets Act**: The Minister of Home Affairs may require the owner or controller of any telecommunications system to produce the originals or transcripts of messages sent or received to or from any place out of Singapore by means of any such telecommunications system.

Some laws restrict the use of lawful interception methods with respect to information that is subject to legal privilege. This is the case for interception requests under the CMCA and the CDSA.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The licence issued to a telecoms licensee generally includes a condition which requires the licensee to cooperate or collaborate with government agencies to provide national security and/or emergency services. The IMDA may also issue specific lawful intercept capability requirements to a telecoms licensee on a confidential basis.

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4.4 How does the state intercept communications for a particular individual?

See the response to question 4.2.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Under the Strategic Goods (Control) Act and the Strategic Goods (Control) Order 2017, the export, transhipment or bringing in transit of systems, equipment and components for cryptographic information security requires a strategic goods permit from Singapore Customs.

See also the response to question 4.2, which sets out a police officer's authority under the CPC to require access to decryption information.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Depending on the telecoms services provided, telecoms licences may include conditions to retain:

- customer records (e.g. customer's name, address, NRIC/passport/registration number, assigned telephone number, details of services provided, date of account activation and source IP address) for not less than 12 months from the date of termination of services to the customer;
- transaction/call detail records and data retention records for at least 12 months; and/or
- billing records of subscribers for at least seven years from the date of issuance of the bill to the subscriber.

The IMDA may also issue specific requirements directly to a telecoms licensee on a case-by-case basis, and require any person to provide it with any document (including any electronic record) and with access to all documents which are related to any function which it is discharging.

In addition, under the Penal Code, it is an offence to destroy or render illegible any document or electronic record which is required to be produced as evidence before court.

The PDPA also provides that an organisation shall cease to retain personal data as soon as it is reasonable to assume that retention is no longer necessary for the purpose for which the personal data were collected and for legal or business purposes.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The distribution of audio-visual media is principally regulated under the BA and the IMDAA. The IMDA has also issued a number of codes of practice and guidelines which may be of relevance. In general, the provision of broadcasting services and the installation of broadcasting apparatus require licences. All broadcasting licensees are required to comply with the codes of practice relating to standards of programmes and advertisements and broadcast standards.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Content regulation differs depending on the platform on which it appears and there are specific codes of practice in relation to free-to-air TV programmes, subscription TV programmes, video-on-demand and the internet.

Strict limits are imposed on what may be shown on free-to-air television (the highest permissible rating is PG13). The IMDA adopts a co-regulatory approach with the pay-TV industry and does not pre-vet programmes of pay-TV service providers. Depending on the scale and type of service offered, pay-TV service providers must submit to the Subscription-TV Programme Code or the Niche Services Code.

The IMDA has adopted a three-pronged approach to regulating internet content:

- internet content providers and internet service providers must comply with the Broadcasting (Class Licence) Notification (**BCLN**) and the ICP;
- industry self-regulation is encouraged; and
- media literacy and cyber wellness through public education are promoted generally.

The IMDA has also published the TV Advertising Code, which outlines the general standards to be observed for advertisements shown on all TV broadcast services (including pay-TV services). The Advertising Standards Authority of Singapore is an industry body which publishes the Code of Advertising Practice.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The different types of licences in terms of distribution are as follows:

- **Broadcasting licence**: applies to the delivery of broadcasting services, including free-to-air and subscription TV and radio and online services.
- **Broadcasting apparatus licence**: required to install, import, offer for sale or operate broadcasting apparatus (TV receive-only satellite receiving systems).

The BA grants the IMDA wide authority over the form, duration and terms and conditions applicable to such licences. All holders of class licences are subject to the BCLN which means that a licensee must remove or prohibit the broadcast of a programme if the IMDA believes the programme is against public interest, public order or national harmony, or offends good taste or decency.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Transfers of broadcasting or broadcasting apparatus licences require the prior written consent of the IMDA and any purported transfers are deemed void. Ministerial approval is required to enable a person to become a substantial shareholder, a person controlling 12% or more or an indirect controller of a licensee.

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6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Under the Copyright Act, network service providers (**NSPs**) will not be found liable for copyright infringement for transmitting, routing or storing infringing material (including an infringing electronic recording of a performance), or linking a user to an online location of infringing material, if certain conditions are met. Under the Copyright (Network Service Provider) Regulations, one of the conditions is that the NSP must have reasonably implemented a policy for the termination of user accounts of repeat infringers.

The ETA also excludes NSPs from civil and criminal liability with respect to third-party electronic materials to which they provide access, if such liability is based on the making, publication, dissemination or distribution of such materials or on the infringement of rights in such materials. However, this provision does not affect an NSP's obligation under law or court order to remove, block or deny access to any material or a NSP's liability for copyright infringement if the conditions under the Copyright Act and the Copyright (Network Service Provider) Regulations are not met.

The Singapore court has ruled that an internet-based service provider that allowed users to record free-to-air broadcasts and store them on that provider's servers did not infringe copyright under the Copyright Act. In its ruling, the court stated that where copyright legislation is not clear, it should be interpreted "*in the light of technological advances which have clear legitimate and beneficial uses for the public*".

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

A content owner may give notice to an NSP to remove or disable access to infringing material on the NSP's primary network or disable access to the infringing material on the originating network. Taking reasonable steps to comply with a content owner's notice is one of the conditions the NSP must satisfy to avoid liability for copyright infringement under the Copyright Act.

In addition, a court may order an NSP to do one or more of the following:

- disable access to an online location that is physically situated outside Singapore;
- terminate a specified account;
- remove infringing material from its primary network; and/or
- disable access to infringing material on its primary network or another network.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The IMDA's policy approach towards net neutrality can be summarised in five key principles which telecommunications operators and internet service providers should adhere to:

- No blocking of legitimate internet content or imposition of discriminatory practices or other measures that will render legitimate internet content effectively inaccessible or unusable. Legitimate content is content that is not unlawful under local legislation and regulations, such as the ICP.
- Compliance with competition and interconnection rules in the TCC.
- Compliance with information transparency requirements and disclosure of network management practices and typical broadband download speeds to end-users.
- Meeting minimum broadband Quality of Service standards which must not render legitimate internet content effectively inaccessible or unusable.

Meeting information transparency, minimum Quality of Service and fair competition requirements when offering niche or differentiated internet service offerings. Telecommunications operators and internet service providers thus have flexibility to offer specialised or customised internet content, provided such do not block legitimate internet content or result in anti-competitive effects.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Internet service providers and internet content providers, which are class licensed under the BCLN, are required to:

- comply with the ICP;
- upon receipt of notice from the IMDA that internet content is undesirable, harmful or obscene, prevent end-users from accessing that content; and
- upon a subscriber's request, offer to provide that subscriber internet content filtering arrangements.

There are also BCLN restrictions on the use of their services for: (i) any purpose that is against public interest, public order or national harmony, or offends good taste or decency; (ii) gambling purposes; or (iii) immoral activity.

Under the ICP, broadcasting class licensees must:

- use their best efforts to ensure that prohibited material is not broadcast via internet to users in Singapore; and
- deny access to sites notified by the IMDA as containing prohibited material. In this regard, the IMDA maintains a list of 100 blocked websites which are symbolic of the type of content deemed offensive or illegal in Singapore.

Prohibited material is material which is objectionable for being contrary to public interest, public morality, public order, public security, national harmony or applicable Singapore laws.

There are no specific regulations relating to blocking access to consumer VPN services. The general rules on internet content blocking would apply.

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Winnie has over 17 years of experience in TMT practice areas in Singapore and the United Kingdom. She was awarded the 2014 Finance Monthly Global Award for 'TMT Lawyer of the Year' in Singapore. She has also been recognised by *The Legal 500 Asia Pacific* 2017 edition as having "long experience in TMT, excellent industry knowledge and attention to detail".

Winnie is a contributor to the 'Communications' volume of *Halsbury's Laws of Singapore*. She is the author of *A Practical Guide to Singapore Data Protection Law* and the co-author of the chapter on 'Cryptography and Electronic Signatures' in a publication launched at the UN World Summit on the Information Society.

ORIONW

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Spain

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Telecoms and Digital content are at the forefront of the development of the digital economy of Spain. These sectors have had very positive outcomes these last few years; there has been a significant growth on the number of companies, turnover, employment, investment and gross added value.

According to the 2016 annual report of the National Observatory of the Telecommunications and Information Society, the turnover for the IT and digital content sectors in 2015 has been of 97,931 million euros, which is an increase of 8.5% compared to the previous year. Regarding the IT sector, the turnover was over 80,000 million euros (82,464M€), the branches of computing activities, wholesale trade and ICT manufacturing experienced an over 10% revenue growth. With regard to the digital content sector, the turnover was 15,467 million euros, which is an increase of 13.2% compared to the previous year. The main activities which contributed to this increase were radio and television (3.2%), followed by cinema, video and publications.

The most significant market participants, according to a ranking made by the National Commission on Markets and Competition, are *Vodafone España S.A.U.* with an annual income of 3,866,810,000 euros, *Telefónica Soluciones de Informática y Comunicaciones de España S.A.U.* with an annual income of 624,897,000 euros and *BT España Compañía de Servicios Globales de Telecomunicaciones S.A.U.* with an annual income of 375,661,000 euros.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

Basic regulations

- Law 9/2014, of 9 May, of Telecommunications.
- Law 7/2010, of 31 March, of Audio-visual Communications.
- Royal Decree 726/2011, of 20 May, modifying the regulation concerning the conditions for the supply of electronic communication services, the universal service and the protection of users.

  Royal Decree 458/2011, of 1 April, concerning radio spectrum matters for the development of the digital society.
- Royal Decree 346/2011, of 11 March, approving the Regulation that comtrols the common telecommunications infrastructures for access to telecommunications services inside buildings and the equipment installations and telecommunications systems business.
- Ministerial Order ITC/658/2011, of 18 March, modifying Order itc/332/2010, of 12 February, approving the National Frequency Allocation Table.

Administrative regulations

- Royal Decree 1152/2011, of 29 July, modifying Royal Decree 1226/2010, of 1 October, developing the basic organic structure of the Ministry of Industry, Tourism and Commerce.
- Decision of 21 June 2011, of the Telecommunications Market Commission, creating the electronic headquarters of the Telecommunications Market Commission.
- Order PRE/1483/2011, of 3 June, publishing the Agreement of the Council of Ministers of 3 June 2011 to promote the effective constitution of the State Council of Audio-visual Media.
- Royal Decree 351/2011, of 11 March, modifying the Statute of the business public entity Red.es, approved by the Royal Decree 164/2002, of 8 February.

Universal service

- Royal Decree 424/2005, of 15 April, approving the Regulation concerning the conditions for the supply of services of electronic communications, the universal services and the protection of users.

Quality of Service

- Order IET/1090/2014, of 16 June, regulating the conditions concerning the quality of the service in the electronic communication services supply.

User rights

- Charter of rights of the users of electronic communication services, approved by Royal Decree 899/2009, of 22 May.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The government ministry in charge of the regulation of the telecom and audio-visual media distribution sectors is the Ministry of Energy, Tourism and Digital Agenda, in particular, the competent division of the Ministry is the State Secretariat of the Information Society and Digital Agenda.

The competent regulatory authority for the telecoms and audio-visual media distribution sectors in Spain is the National Market and

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Competition Commission, which has the aim to ensure the correct functioning of the electronic communication market through the establishment and supervision of the fulfilment of the obligations by the operators and the resolution of the conflicts between market agents.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The telecom and audio-visual media distribution sectors were gradually liberalised during the nineties. At that point, the liberalisation of the network industry, the end of state monopolies and the need to adapt to the European regulations resulted in the creation of many organisations such as the Telecoms Market Commission. In 2013, the National Market and Competition Commission was created by the unification of the six commissions created due to the liberalisation.

In Spain there is no restriction on the foreign ownership or the investment in the telecoms, audio-visual media distribution and the internet sectors in Spain.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Spain has been a WTO member since 1 January 1995 and a member of GATS since 29 August 1963, together with the other Member States of the European Community.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

In Spain, the development of the telecoms sector has experienced a considerable progress in recent times. The technological progress has led to a parallel growth of the regulations that shape the sector. The liberalisation in the telecoms sector in Spain and the commitments made with the European Union in this matter have led to the emergence of a broad and innovative body of legislation which is in itself a solid framework for the dynamism and agility required by this sector.

We could structure the legislation of this sector in different branches, such as, basic telecommunications regulations, administrative regulations, the universal service, the quality of the service, the rights of the users, mobile communications, the radio spectrum, Amateur radio, technical standardisation, fees, rates, numbering policies and specific regulations for radio and television.

The basic telecommunications aspects concerning the provision of telecoms networks and services, the administrative aspects, some aspects of the universal service, the rights of the users, the mobile communications, the amateur radio, fees and rates are mainly regulated through Royal Decrees and orders of the Ministry of Industry, Tourism and Commerce.

The system of control and monitoring of the obligations concerning the universal service is carried out by the Ministry of Energy, Tourism and Digital Agenda. Besides, the complaints of the users can be filed within the Telecommunications User Support Office. The net cost and finance fixing corresponds to the National Market and Competition Commission. With regard to the quality of the provision of telecoms networks and services, the body in charge of the regulations is the Ministry of Energy, Tourism and Digital Agenda.

The radio spectrum is mainly regulated in a National Frequency Allocation Table, a basic piece of the spectrum regulation in Spain due to the regulatory and highly technical content of its information regarding the use of the radio-electric spectrum. The table indicates the attributions to the radio-electric services and the uses of the different frequency bands in Spain.

Regarding the technical standardisation, article 7 of Royal Decree 188/2016, of 6 May, which approves the Regulation establishing the requirements for the placing on the market, putting into service and use of radio equipment, and regulating the procedure for the evaluation compliance, market surveillance and the sanctioning regime of telecommunication equipment, indicates that the secretariat of State for the Information Society and the Digital Agenda will publish in the Official Gazette, through resolutions, the interfaces of radio equipment that can be used in Spain. In addition, any radio equipment intended to be placed on the market using frequency bands whose use is not harmonised throughout the European Union shall be subject to the reporting procedures laid down in Directive 2015/1535/EU.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The regulatory and competition law authorities in Spain are the National Market and Competition Commission and the competition authorities of the different Spanish autonomous communities.

The National Market and Competition Commission, which began its operations on October 2013, is an entity that promotes and defends proper functioning of all markets, in the interest of consumers and businesses. It is a public entity with its own autonomous legal status. It is independent from Spain's central government although it is subject to parliamentary control. The main functions of the National Market and Competition Commission are: (i) the application of the Spanish and EU competition regulations; (ii) the promotion of the competition and good practices; (iii) market unity; (iv) dispute resolution between economic operators: and (v) monitoring and control over all of the economic sectors.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The resolutions on anti-competitive practices in the area of competition of the Council of the National Market and Competition Commission may not be appealed by the administrative procedure, however, judicial appeals may be lodged in the terms foreseen in the Administrative Jurisdiction Law 29/1998, of 13 July, before the National High Court. The Judgment of the National High Court can be consequently appealed to the Supreme Court when the amount of the sanction is higher than 600,000 euros.

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Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

The current Law on Telecommunications reflects the principles established by European regulations (Directive 97/13/EC). The authorisations are such as enabling titles, general authorisations and individual licences, which are administrative acts that enable and serve as a legal basis for the provision of services, establishment and operation of telecommunication networks, so it has been said that the new regulation leaves the traditional system of administrative concession. The general authorisations are used for real services, data transmission services or private networks.

On the other hand, the individual authorisations are used for cases such as: the allocation of limited resources, guarantee to the operator of rights of easement, to recognise the beneficiary of the forced expropriation or the imposition of public service obligations.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

In Spain, the general authorisation is useful when individual licences are not justified but there are important regulatory objectives that can be achieved by establishing general conditions. Besides, provisions on consumer protection and other essential requirements must be taken into consideration. General Authorisations are usually granted regardless of the open selection procedure; all duly qualified entities are authorised to promote services or operate facilities.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The legal regime applicable to individual licences establishes a set of general conditions or obligations that must be fulfilled by all holders of such licences, among which the following should be highlighted: to forward the information requested by the administration; to guarantee the rights of subscribers and users; transparency in the prices of the services, compliance with standards and technical specifications that are applicable; confidentiality; secret of communications; protection of personal data; ensuring interoperability of services; effective and efficient use of resources of numbering; to contribute to the financing of the universal service; and to ensure the free routing of calls to the emergency services.

In the case of individual licences that are limited in number, to ensure an effective use of the radio spectrum, the award will be made through a tendering procedure, establishing by the Ministry of Public Works the list of bases containing the requirements and conditions to be met by the potential contractors and the service provision regime.

The categories of licences are set out in the Ministerial Order of 22 September 1998 and consist of individual licences classified as A, B and C.

The licences shall be granted for a period of twenty years, renewable for periods of ten years. The total duration of the licence, including extensions, may not exceed 50 years.

The transfer of individual licences shall be permitted under the provisions of article 115 of the Law on Public Administration Contracts, in what is applicable to the contract for the management of public services.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

In Spain, the specific legal provisions dealing with the infrastructure matters are:

- Law 38/1999, of 5 November, of building regulation: this law amends article 2, section a) Of Royal Decree Law 1/1998, of 27 February, on common infrastructure in buildings for access to telecommunication services.
- Royal Decree-Law 1/1998, of 27 February: the main objective of this Royal Decree is to guarantee the right of all citizens to access the different telecommunications services through the authorised operator of their choice, providing the appropriate infrastructure to enable them, it is the shared use of these infrastructures, that their level of quality is adequate and regulating the activity of the installers sector; and, on the other hand, ensure that all service operators have equitable rights to use such infrastructures, which allow them to have access to their potential clients.
- Law 10/2005, of 14 June, on urgent measures for the promotion of digital terrestrial television, liberalisation of cable television and promotion of pluralism: This Law modifies the content of the sixth additional provision of Law 31/1987, of 18 December, on Telecommunications Ordinance, also introduces a series of amendments to Law 41/1995, of 22 December, of digital television by waves terrestrial, addresses the amendment of the tenth transitional provision of Law 32/2003, of 3 November, General of Telecommunications and certain articles of the Royal Decree-Law 1/1998, of 27 February, on common infrastructures in buildings for the access to telecommunications services.
- Royal Decree 401/2003, of 4 April, which approves the Regulation of the common infrastructures of telecommunications for the access to the services of telecommunication inside the buildings and of the activity of installation of equipment and systems of telecommunications. Order CTE/1296/2003, of 14 May: This Order establishes the content and structure of the technical project describing the common telecommunication infrastructures to be included inside the buildings. The Order also approves the Certificate and Bulletin end-of-building models which guarantee, for the benefit of users, that the installation has been carried out in accordance with the technical project and determines the test protocol to which the installation must be subjected in order to guarantee its quality. In addition, the qualification and the necessary technical means are established for those who wish to access the status of telecommunication installer by means of their registration in the Registry of Telecommunication Installers that exists in the Ministry of Telecommunications and for the Society of Telecommunications Information (current Secretary of State for the Information Society and Digital Agenda).
- Order ITC/1077/2006, of 6 April: This Order modifies certain aspects of Royal Decree 401/2003, of 4 April and of Order CTE/1296/2003, of 14 May. Basically it contemplates the aspects to take into account in the projects of ICT for the incorporation of the terrestrial digital television, at the same time that it provides the procedure to follow for the adaptation of the existent infrastructures in buildings that currently have collective installation of reception of television terrestrial analogue, to terrestrial digital television reception.
- Royal Decree 346/2011, of 11 March, which approves the Regulation concerning the common infrastructures of telecommunications for the access to the telecommunication services inside the buildings.

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- Order ITC/1644/2011, of 10 June, which develops the Regulation of the common infrastructures of telecommunications for the access to the telecommunications services inside the buildings, approved by the Royal Decree 346/2011, of 11 March.

Besides, there is also specific regulation concerning the procedure to install the Common Infrastructure of Telecommunications in a building of new construction or that is going to undergo a comprehensive rehabilitation. The drafting of a technical project shall be entrusted to a competent engineer or technical engineer who, in harmony with the architectural project, foresees the characteristics of the Common Infrastructure of Telecommunications in accordance with current regulations and with the needs of each case (article 3.1 of Royal Decree-Law 1/1998). The content and structure of the Common Infrastructure of Telecommunications technical project shall comply with the provisions of Annex I of Order ITC/1644/2011 of 10 June.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The wholesale interconnection and access is monitored by the National Market and Competition Commission. Within the context of regulation of markets, certain specific obligations are imposed upon operators designated as having significant market power in the market of reference. These obligations include, among others: obligations to provide other operators with access to their network, obligations regarding price control and cost accounting and obligations related to transparency and non-discrimination.

Disputes regarding wholesale interconnection and access shall be resolved within the National Market and Competition Commission.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The operators having significant market power in a market of reference are required to publish their standard interconnection contracts and prices as a consequence of the obligation of transparency established in Law 9/2014, of 9 May, of telecommunications and monitored by the National Market and Competition Commission.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

According to Law 9/2014, of 9 May, of telecommunications, such charges for interconnection and network access are subject to cost regulations. In particular, the aim of the charges are to cover the administrative costs of regulatory work relating to the preparation and implementation of secondary Community law and administrative acts, such as those relating to interconnection and access. These fees are managed by the general State Administration and are set out in Annex I of the above-mentioned Law.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

The operators having significant market power in a market of reference are subject to accounting separation and functional separation.

With regard to the supply of services or exploitation of electronic communication networks, public or private entities that, in accordance with current legislation, have special or exclusive rights for the provision of services in another economic sector and that operate public networks or provide electronic communications services available to the public shall carry separate and audited accounts for their activities, or establish a structural separation for the activities associated with the operation of networks or the provision of electronic communications services. By means of a Royal Decree, exemption from this obligation may be established for entities whose annual gross operating revenue from activities associated with electronic communications networks or services is less than 50 million euros.

The installation and operation of public networks or the provision of electronic communications services under the provision of services to third parties by operators controlled directly or indirectly by public administrations shall be carried out in compliance with the principle of private investing, with due separation of accounts, in accordance with the principles of neutrality, transparency, non-distortion of competition and non-discrimination, and in compliance with the rules on State aid referred to in articles 107 and 108 of the Treaty on the Functioning of the European Union.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

There is no specific regulation at a national level for broadband Internet access services offered to end-users, thus, it is offered in free competition between operators, who set their prices and coverage areas freely. The providers of broadband Internet access services are subject to the general rules that apply to all operators of electronic communications services, in areas such as the defence of consumer and user rights, or quality of service.

At a wholesale level, the National Markets and Competition Commission determines the conditions under which operators can use the operator's network or designated operators with significant market power to offer their own services broadband in competition with those offered by the operator or operators of such networks. Also, in order to promote competition, the Commission can impose symmetric obligations that apply equally to all operators. In particular, in order to ensure competition, the National Markets and Competition Commission may regulate certain conditions for the provision of services in the broadband Internet access market. Following the relevant market analysis, the National Markets and Competition Commission has considered it necessary to intervene at the so-called wholesale level. This means that, despite not intervening in offers for end users (retail level), the National Markets and Competition Commission sets the conditions under which the operator with significant market power, in this case Telefónica, must make available to other operators certain elements and services of your network, so that they can form their own broadband services at the retail level. Among these wholesale services that Telefónica is obliged to provide are: (i) unbundled access to the subscriber loop; (ii) indirect access or wholesale broadband access; and (iii) access to passive ducts and infrastructures. These services are regulated in the Offer of Access to the Loop of the Subscriber (OBA), in the Reference Offer of the New Broadband Ethernet Service (NEBA) and in the Wholesale Offer of Access to Registers and Ducts of Telefónica (MARCo), which are approved by the National Markets and Competition Commission regularly.

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On the other hand, the European Commission also regulates the wholesale prices for roaming services, establishing the prices that the operators pay each other for using their respective networks.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Operators with significant market power in a market of reference have the obligation to set the price on the basis of cost-orientation.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

In Spain, the universal service consists of a set of basic electronic communications services whose provision is ensured to all users who request it, regardless of their geographic location, with a specified quality and at an affordable price. These services are:

(i) Provision of the connection to the public electronic communications network from a fixed location with broadband capacity at 1 Mbps.

(ii) Provision of telephone service available to the public from a fixed location.

(iii) Provision of the telephone service of payment with coins or cards through the terminals located in the public thoroughfare (telephone booths).

(iv) Preparation and delivery of the guide of subscriber numbers.

(v) hone number inquiry service for subscriber numbers.

Specific measures for **users** with disabilities.

The applicable provisions regulating this matter are:

- Law 9/2014, of 9 of May, General of Telecommunications.
- Royal Decree 424/2005, of 15 April, which approves the Regulation on the conditions for the provision of electronic communications services, the universal service and the protection of the users.
- Royal Decree 726/2011, of 20 May, which modifies the Regulation on the conditions for the provision of electronic communications services, universal service and user protection, approved by Royal Decree 424/2005 of 15 April.
- Order IET/1090/2014, of 16 June, which regulates the conditions related to the quality of service in the provision of electronic communications services.
- Order PRE/531/2007, of 5 March, which publishes the Agreement of the Delegated Commission of the Government for Economic Affairs of 25 January 2007, which approves the conditions to guarantee the affordability of the offers applicable to the services included in the universal service.
- Order PRE/1619/2010, of 14 June, which publishes the Agreement of the Delegated Commission of the Government for Economic Affairs of 13 of May of 2010 that modifies the threshold of family income that gives access to the social payment.
- Order ETU/1972/2016, of 23 December, which designates *Telefónica de España, S.A.U.*, as the company responsible for the provision of the universal telecommunications service element related to the preparation and delivery to the subscribers of the telephone service available to the public of the telephone directory.
- Order ETU/1973/2016, of December 23, by which *Telefónica de España, S.A.U.* is designated as the operator responsible for the provision of universal telecommunication service elements related to the provision of the connection to the public electronic communications network and the provision of publicly available telephone service.
- Order ETU/1974/2016, of December 23, which designates *Telefónica Telecomunicaciones Públicas, S.A.U.*, as the operator responsible for the provision of the universal telecommunications service element related to the provision of a sufficient supply of public pay telephones.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The Spanish legal framework of numbering, addressing and denomination is explained in Chapter V of Title II of Law 9/2014, of May 9, General Law of Telecommunications, in Title IV of the Regulation on electronic communications markets, access to networks and numbering, and in the National Telephone Numbering Plan, the latter two approved by Royal Decree 2296/2004, of December 10.

According to the National Numbering Telephone Plan the telephones are allocated by a territorial criteria. The Spanish territory is organised in provincial numbering areas and telephone districts. From the year 2013 there is a single telephone district for each of the 50 provincial numbering areas existing ones. In this way, the boundaries of each of the telephone districts coincide with those of the corresponding provincial numbering area, which roughly coincide with the administrative provinces. All provincial numbering areas have at least two three-digit codes, one starting with 9 and another beginning with 8. The number of the callsign assigned to each provincial zone depends exclusively on its population and its numbering needs. The callsigns in the same provincial area have the same objective: to identify the zone. The National Numbering Plan assigns the telephone numbers.

2.17 Are there any special rules which govern the use of telephone numbers?

See question 2.16 above.

2.18 Are there any obligations requiring number portability?

According to article 21 of Law 9/2014, of May 9, General of Telecommunications, reservation of numbering (portability) is an essential right of subscribers to the telephone service available to the public. The regulation establishes that operators will ensure that subscribers can keep their telephone number, prior to their request, regardless of the operator providing the service.

The National Markets and Competition Commission can set, by circular, the characteristics and conditions for the conservation of numbers.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

In Spain, the authority which regulates the spectrum use is the National Table of Frequency Allocation.

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3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

In Spain, the radio spectrum is a public domain property whose ownership, management, planning, administration and control corresponds to the State. Such management shall be carried out in accordance with the provisions of the Law of General Telecommunications and the international treaties and agreements to which Spain is a party, in accordance with the rules applicable in the European Union and the resolutions and recommendations of the International Telecommunication Union and other bodies' countries.

Through an Order of the Ministry of Industry, Energy and Tourism, the National Frequency Allocation Table is approved for the different types of radio-communication services, defining the allocation of frequency bands to their respective services with the technical characteristics that may be necessary. Likewise, the National Frequency Allocation Table, in accordance with the international regulation on allocation and allocation of frequency bands and assignments, the national and international availability of the radio frequency spectrum and social demand, may establish the following aspects:

a) reserving part of the spectrum for certain services;

b) preferences of use because of the social purpose of the service to be provided;

c) delimitation of the frequency bands that are reserved to the Public Administrations or public entities of which they are dependent for the direct management of their services; and

d) forecasting the future exploitation of the different frequency bands, promoting technological and service neutrality.

In order to ensure efficient and effective use of the radio spectrum, the Ministry of Industry, Energy and Tourism may limit the number of official concessions to be granted on that domain for the operation of public networks and the provision of electronic communications services. When this happens, a bidding procedure will be processed for the granting of the same. To this end, the convocation and the list of bases for the bidding will be approved, by order of the Minister of Industry, Energy and Tourism. The bidding procedure must be resolved by order of the Minister of Industry, Energy and Tourism within a maximum period of eight months from the call for tenders.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Operators exploiting the electronic communications networks or services that make use of the public radio domain must have the corresponding title authorising such use.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Regarding the fee for the reservation of the public radio-electric domain for private use, the procedure for calculating the amount of radio-electric public domain (N) and the value of the radio-electric reservation unit (V) are those established in Annex I of the General Law on Telecommunications, considering the quantification of the coefficients in force in each moment according to the annual updates of the Law of General State Budgets. The rate will be the result of dividing the value of the product by NxV, by the conversion rate contemplated in Law 46/1998.

As for the fee for the reservation of the public radio-electric domain for special use, the amount of the fee shall be the one deducted from the provisions of the General Telecommunications Law.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The Royal Decree 123/2017, of 24 February, which approves the Regulation concerning the use of radio spectrum public domain provide the consequences of a change of control of the licensee.

In the transfer of qualifying titles for the exclusive use of the radio-electric public domain, the ownership of the enabling title is transmitted and, consequently, all the rights of private use of the radio-electric public domain derived from the title are transmitted for the remaining period of time valid and throughout the geographical scope of the title. The new owner will be subrogated in all the rights and obligations of the previous owner, derived from the title to be transferred. In particular, in the case of concessions granted under the tendering procedure, the new holder will be subrogated in all the conditions specified in the base sheet governing that procedure, as well as in all the commitments assumed by the holder in the offer that served as the basis for the award. The approved technical projects and the authorisations for the commissioning, corresponding to stations associated with the qualifying title for the use of the radioelectric public domain object of transfer, will maintain their validity for the new holder. For these purposes, within one month of the date of authorisation of the transfer, the new holder must send to the Secretariat of State for the Information Society and the Digital Agenda the list of stations that he will continue to use. After this period, the Secretariat of State for the Information Society and the Digital Agenda will automatically cancel the rest of the stations.

Entitlements for the private use of the public radio domain that have been transferred may be subject to further transfers. Notwithstanding the foregoing, if the qualifying titles for the use of the public radio domain were granted by means of a tender procedure and in the regulatory base sheet of the same a minimum period was established in which such qualifying titles could not be transferred, successive transfers may not be made until such period has elapsed from the date on which the previous transfer was authorised.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

See question 3.5 above.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Legislation within cybersecurity has two main objectives: (1) secure cyberspace (information system and people); and (2) provide effective legal instrument to the authorities and security agencies for the investigation and prosecution of criminal activities and terrorism.

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4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Communication intervention has a double nature in a criminal proceeding: (1) it serves as a source of criminal investigation, directing the police actions; and (2) and it can be used as means of evidence. In both cases this intervention requires the compliance of the essential requirements which ensure, that the interference in the scope of privacy is conducted respecting the constitutional rights.

Relevant legislation:

- Article 579 of the Code of Criminal Procedure.
- Organic Law 2/2002, of 6 May, about judicial control of the National Intelligence Center.
- Law 25/2007, of 18 October, about data preservation concerning electronic communications and public communications networks.
- Law 32/2003, of 3 November, General Telecommunications.
- Law 34/2002, of 11 July, about Services of the Information Society and electronic commerce.
- Organic Law 4/1981, of 1 June, about states of alert, emergency and siege.
- In the military field, the Organic Act 2/1989, of 13 April, about military procedure.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The rules which require market participants to maintain call interception capabilities are mainly regulated in the Ministerial Order IET/2530/2012, of 19 November. Some of the obligations of the obligated subjects are providing legal interception of communications as described in the order, maintaining a maximum number of active interceptions simultaneously, or providing information on the location of the terminal of the subject to the interception or of its interlocutors. The rules cover traditional telephone calls, VoIP calls, emails and any other forms of communications.

4.4 How does the state intercept communications for a particular individual?

It could be defined as a diligence investigation, granted by the competent judicial authority in pre-trial phase, carried out under the supervision and control of the competent judicial body, with the purpose of gathering content about the communications of the suspect with an immediate end to investigate a crime, his circumstances and perpetrators and provide with evidence for the trial.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The principal rule governing the use of encryption is the Organic Act 15/1999, about personal data protection. The main objective of this Act is to ensure and protect, with regard to the processing of personal data, public freedoms and fundamental rights of individuals, specially their honour and personal and family intimacy.

The core budget for a transfer of data is the existence of a valid judicial resolution which requires it. This resolution must provide which retained data must be transferred and the time frame in which it must be transferred. In case no time frame has been indicated the data should be transferred in the next 72 hours counting from the next day of delivery.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Operators are obliged to retain data about web traffic, geographic location and user identification.

This information will be retained normally for 12 months, but the time frame can be expanded till two years maximum or cut down to six months, prior to consultation to the operators.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The main norms regulating the distribution of audio-visual media in Spain are:

- Law 9/2014, of 9 May, General of Telecommunications.
- Law 3/2013, of 4 June, of creation of the National Commission of the Markets and the Competition.
- Law 8/2009, of 28 August, financing of the Spanish Radio and Television Corporation.
- Law 7/2010, of 31 March, General of Audio-visual Communication.
- Law 17/2006, of 5 June, of the radio and the television of state ownership.
- Law 55/1999, of 29 December, on Fiscal, Administrative and Social Order.

The National Markets and Competition Commission oversees the proper functioning of the audio-visual communication market, this including the distribution of audio-visual media.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

In Spain, the main difference regarding content regulation between content broadcast via traditional distribution platforms and content delivered over the internet or other platforms is that only the content broadcasted via traditional distribution considering this as audio-visual communication is overseen by the National Markets and Competition Commission. This implies higher levels of control concerning the control of content since one of the main duties of the Commission is to ensure that the audio-visual content complies with legislation on the subject of protection of minors, advertising and accessibility.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The licences for the distribution of audio-visual media are different depending on the means of the provision. In this sense,

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the licence can be for the provision of radio, television or related communication services. Such provision of services require the reliable communication before the competent audio-visual authority prior to the commencement of the activity. Besides, depending on the territorial scope of the coverage, the licence may be either national or local. In the scope of state coverage, the competition for the granting of licences, including digital terrestrial broadcasting and medium wave corresponds to the Government, without prejudice to the participation of the Autonomous Communities. To this end, the Government will establish, in agreement with the Autonomous Communities, the mechanisms of collaboration and cooperation that will ensure the participation of the Autonomous Communities in the planning of audio-visual licences at the state level. For the provision of the television communication service, local licences may provide coverage to one or more neighboring municipalities and, where appropriate, to a complete insular domain.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

The licences may be subject to transmission and rent.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

According to Spanish case law, internet service providers do not have a general obligation to monitor the information they transmit or store, nor do they have an obligation to actively seek for possible illicit conducts that users can make by means of the use of the services of the internet service provider. As a consequence, the general rule is the exemption of liability. However, the internet service may be found responsible if the internet service provider is the owner of the content if there has been a lack of diligence with effective knowledge.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

According to Spanish case law, internet service providers are obliged to assist content owners whose rights may be infringed by means of file-sharing or other activities.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The State Secretariat for the Information Society and the Digital Agenda of the Ministry of Energy, Tourism and Digital Agenda is responsible for monitoring the net neutrality in Spain. In Spain, net neutrality is monitored and safeguarded and no specific requirements have been established.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

As a consequence of net neutrality, the telecommunications operators will not be able to block, discriminate or slow down Internet traffic regardless of the contents that go through their networks or their providers. However, an exception to this may be applied by court order, to ensure security, or when it is considered that there is a danger of congestion in their networks.

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Switzerland

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Carmen De la Cruz

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

(a) Telecoms, including internet

Switzerland, with a total population of more than 8.4 million inhabitants (end of 2016), has one of the highest mobile phone penetration rates in Europe. For the time being, there are three main providers competing in the mobile market. Nevertheless, the number of mobile customers has decreased for the second consecutive year, by some 2.2%. The migration to subscription products (post-paid) no longer offsets the loss of customers with prepaid offerings, and the three main network operators registered a fall in their customer numbers during 2016.

At the end of 2016, the market leader Swisscom with the widest network coverage and with 57.75% market share had 6,612,000 mobile lines, Sunrise had 2,967,000 mobile lines and 26.9% of the market and Salt 1,872,000 mobile lines with a total of 16.35% of the market. In total, there were 11,451,000 mobile lines in Switzerland by the end of 2016, covering 4,211,000 mobile lines in the pre-paid market and 7,240,000 in the post-paid market.

With approximately 11.5 million subscriptions for a total population of 8.4 million inhabitants, the mobile telephony penetration rate in Switzerland was approximately 126% in mid-2016.

(b) Audio-visual media distribution sectors

(i) Annual revenue

The total annual operational revenue of telecommunication services for 2016 in Switzerland is approx. CHF 18'720 million (18,720 bn) according to the Swiss Regulator.

(ii) 3–5 most significant market participants

SRG SSR is the main provider for TV and radio channels in Switzerland, with programmes in all Swiss national languages, i.e. German, French, Italian and Rhaeto-Romanic. SRG is made up of five Enterprise Units and the General Management, and holds four subsidiaries. With around 6,000 employees, an annual turnover of approximately 1.6 billion Swiss francs, 17 radio stations and seven television channels, including Rhaeto-Romanic programming, as well as complementary websites and teletext services, SRG is the largest electronic media organisation in Switzerland. Its radio stations lead their respective markets in all four regions of national languages as described above– as do the television channels at prime time. Besides SSR SRG, there is a total of 43 different local and regional radio stations and 13 regional TV stations offering services to the population of Switzerland.

The number of digital television subscribers on the fixed network continued to grow significantly during 2016, whereas the cable operators continued to lose customers in their core sector. The DSL providers are entering into very serious competition with the cable operators in this market segment. The market share of all the cable operators, including 2.43 million digital television subscriptions, is still close to 60%. Considering the providers individually, Swisscom consolidated its leader position, which it took over from UPC the previous year, only 10 years after its entry into this market.

Swisscom in fact gained 145,000 subscriptions in 2016 and hence reported a growth of almost 11% between 2015 and 2016. The traditional telecommunication operator Swisscom had 1,476,000 subscribers on its digital TV products and has seen its market share grow to 36.3%. Sunrise, having entered as the last player into this market in 2012, gained 29,000 subscriptions over the same period, i.e. a rate of growth of almost 22%. Sunrise's market share grew to 4%.

The cable operators as a whole lost more than 80,000 subscriptions in 2016, a decline of more than 3%. UPC, which lost more than 50,000 subscriptions on its digital TV products, down almost 4%, saw its market share fall to 30.7% by the end of 2016. The cable operations acting under the marketing name of Quickline reported a growth in the number of its TV subscriptions, mainly due to the arrival of two new cable providers acting as new partners in autumn 2016. Quickline thus gained 17,000 subscriptions in 2016 and its market share increased to 9.3%. With nearly 380,000 TV subscriptions in total at the end of 2016, Quickline was the second largest CATV provider group in Switzerland after UPC.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms, including internet

The most important legislation in the area of telecoms is the Swiss Telecommunications Act (TCA). The aim of this Act is to ensure that a range of cost-effective, telecommunications services of high quality and nationally and internationally competitive is available to private individuals and the business community. In particular, this Act shall ensure that a reliable universal service is provided, at affordable prices, for all sections of the population in all parts of the country. In addition, it shall ensure that telecommunications traffic is free from interference and respects personal and incorporeal property rights covered by the telecommunication secret. Furthermore, it shall allow effective competition at the provision of telecommunications

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services. Finally, yet importantly, it shall protect users of telecommunications services from unfair mass advertising and from abuse associated with value-added services.

It has to be noted that based on this Act, several Ordinances such as the Ordinance on Telecommunication Services, the Ordinance on Telecommunications Installations, the Ordinance on the Addressing Resources of Telecommunications Services and the Ordinance on Frequency Management and Radio Licenses have been put in place.

To communications services, the Federal Act on Surveillance of Post and Telecommunications (SPTA/ lawful interception) and the respective Ordinance apply.

The Federal Act against Unfair Competition (UCA) as well as the Swiss Federal Constitution also apply.

(b) Audio-visual media distribution sectors

The Federal Act on Radio and Television (RTVA) and its respective Ordinance governs the audio-visual media distribution in Switzerland. This Act regulates the broadcasting, processing, transmission and reception of radio and television programme services.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Federal Communications Commission (ComCom) is the independent regulatory authority of surveillance for the telecommunications market. Established by the Law on Telecommunications (LTC) of 30th April 1997, it consists of seven members nominated by the Federal Council. The Commission is not subject to any Federal Council or Department directives. It is independent of the administrative authorities and has its own secretariat. The Commission is in charge of the regulation of the telecommunications market and awarding the universal licence as well as radio communication licences for the use of the frequency spectrum of determining access conditions and prices when providers cannot reach an agreement. In addition, the Commission approves of the national numbering plans.

The Federal Office of Communications (OFCOM) deals with questions related to telecommunications, broadcasting and post. In these areas, the OFCOM is responsible for tasks relating to regulation and to national authority, in particular ensuring the quality of the universal service and the public service. The Office prepares the decisions of the Swiss government (the Federal Council), the Swiss Federal Department of the Environment, Transport, Energy and Communications (DETEC) and the Swiss Federal Communications Commission (ComCom). The OFCOM is also responsible for Swiss international activities.

In addition, any person, including any moral person, may turn to the so-called "Ombudscom" regarding a dispute with a telecommunications service provider or added-value service provider, as long as they are the end consumer of the service.

The Independent Complaints Authority for Radio and Television (ICA) is an extra-parliamentary Federal commission competent for complaints against Radio and television programmes provided by national, regional and local Swiss broadcasters, other journalistic material published by the national broadcaster, SRG SSR – encompassing online content, Teletext bulletins, programme-related information, international news and information services, and accompanying material for individual programmes – refused access to a radio or television programme (editorial content or publicity) of a Swiss broadcaster as well as refused access to the editorial content of other journalistic services provided by SRG SSR. The ICA determines whether any violation of the relevant provisions of national and international law has been committed. This includes compliance with the requirements of appropriateness and diversity, observance of fundamental rights, protection of minorities and the prohibition of glorification or extenuation of violence. Appeals against decisions of the ICA may be lodged directly with the Federal Supreme Court.

Before a complaint can be filed, the proceedings must be brought before the office of the ombudsman. The office of the ombudsman acts as arbitrator and mediator. The Authority comprises nine part-time members appointed by the Federal Council, and office services. It is not bound in its area of responsibility by any instructions from the Federal Assembly, the Federal Council and the Federal Administration. The ICA submits an annual report on its activities to the Federal Council. The ICA is organised in a quasi-judicial fashion. The Authority's proceedings are normally held in public.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

In Switzerland, the market for telecommunications has been liberalised since the late nineties. The Swiss liberalisation model is based mainly on the introduction of carrier selection for local, national and international calls and for mobile communications, and on number portability. The call-by-call function can be used based on prior registration and there is no third-party billing. In Switzerland, the universal service with regard to telecommunications services is guaranteed by the award of a licence of fixed duration. There is no "*ex-ante*" regulation within this framework, but price caps are fixed for the services forming part of the universal service. In the wholesale market, only interconnection prices are subject to "*ex-post*" regulation.

Liberalisation means that the market-dominant companies are obliged to guarantee interconnection to other companies. Since January 2000, interconnection prices have been based on the calculation model known as "Long Run Incremental Costs" (LRIC). For a competitor, in order to be able to connect an end user directly, it must install its own infrastructure, since an unbundled provision of the subscriber line is not yet possible.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Switzerland has been a member of the WTO since 1st July 1995. Furthermore, Switzerland is member of the GATS and assumes commitments in the communication sector.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The Telecommunication Act (TCA) regulates the transmission of information by means of telecommunications techniques. The TCA is being revised focussing on empowering consumers, fostering competition, deregulation, and adaptations to handle internet issues.

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2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The Federal Communication Commission (ComCom) is the independent supervisory regulatory authority for the telecommunications market.

The Competition Commission is the independent authority applying the Cartel Act.

Both authorities are competent for the telecommunications sector, limited to their legal scope of examination.

The Federal Office of Communications (OFCOM) deals with questions related to telecommunications, broadcasting and post. It is part of the Federal Administration and does not act independently.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions of Federal authorities can be appealed in front of the Federal Administrative Tribunal based on the Swiss Telecommunications Act as well as the Swiss Administrative Procedural Act.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Generally, telecommunication service providers only have to register with the Federal Office of Communications (OFCOM). Applicants need to provide general information about their corporation, the provided service, the interface, and information on the infrastructure used.

The revision of the Telecommunication Act (TCA) will further alleviate the obligation to register with the OFCOM.

ComCom allots licences for mobile phone frequencies.

The ComCom grants licences for a universal service provider. The universal service guarantees a basic telecommunications service to all regions of Switzerland and need to be affordable, reliable and of a pre-defined quality. ComCom designated Swisscom as the universal service licensee on 21st June 2017 for 10 years and again on 19th May 2017 for the period from 2018–2022.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

In general, service providers are only required to register with the OFCOM. There is no general authorisation for service providers beyond the duty to register.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The competent authority has to consent to the transfer of a licence, either in whole, in part, or in case of an economic transfer following the takeover of the licensee by a third party.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The owners of land in public use (roads, footpaths, squares, waterways, lakes, banks and shorelines) are required to allow providers of telecommunication services to use that land, following a simplified procedure.

If certain conditions are met (among others: public interest), the OFCOM can grant the service provider to expropriate. The TCA refers to the Federal Act on Expropriation.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The TCA obliges the provider of telecommunication services with a dominant market position to provide access to other providers in a transparent, non-discriminatory manner at cost-oriented prices for unbundled access to the local loop, fast bit stream access for four years, rebilling for fixed network local loops, interconnection, leased lines, and access to cable ducts, as long as they have sufficient capacity.

When providers of telecommunications services disagree on the access conditions over a period of three months of negotiation, each party can ask the ComCom to decide on basis of a proposal by the OFCOM.

Civil courts are competent for other dispute resolution.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

The providers of telecommunication services who have a dominant position provide the OFCOM with a copy of their access agreement. The OFCOM allows agreements to be accessed, in absence of an overriding public or private interest that prevents publication.

No other obligation to publish the said agreements exist.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Providers of telecommunication services having a dominant position are obliged to provide access and interconnections at cost-oriented prices.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

In Switzerland, in general, operators are not subject to specific obligations concerning accounting separation, functional separation and/or legal separation. However, services delivered based on prices calculated on LRIC may lead to accounting separation obligations.

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2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

The Swiss Federal Council has passed the message of the Telecommunications Law Revision (TLR) to Swiss Parliament. The existing frameworks have created intense competition among hundreds of providers and promote investment in the various networks. Particularly at the present time, when fixed networks are undergoing broadband expansion and the development of fifth-generation mobile telephony networks is forthcoming, investment security is fundamental. Increased regulation, as incorporated in the revision of the TLR, distorts the market according to market leaders and threatens important investment projects in the peripheral regions. Issues such as roaming, net neutrality, consumer protection and youth protection have been tackled by the industry itself.

From an industry perspective, the unbundling of the local loop has been established based on the Ordinance on Telecommunication Services.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Since the liberalisation of the telecommunications markets in 1998, these markets have developed extremely dynamically. The market entry of a large number of new providers not only led to sharply falling prices for mobile and fixed-network services, but also to product innovations and a massive increase in the range of services offered.

The free market does not ensure effective competition in all areas of telecommunications. In order to ensure dynamic market development for the benefit of the Swiss economy and consumers, the public sector is called upon to monitor the behaviour of network operators, who are often powerful market players, and to intervene in a targeted manner if necessary. The regulation of access to the Swisscom network for alternative providers is a key measure in this context.

Price monitoring is an important interface between the population, authorities, telecommunication companies and consumer organisations. In its contacts with suppliers and other authorities, price monitoring is committed to the concerns of consumers. Price monitoring exercised its right of recommendation in recent years, in particular with regard to the determination of access prices to the Swisscom network, the domain name of Switch and the price ceilings for universal service providers.

On retail prices the main restriction is given by the Federal Law on Unfair Competition. Value-added-Services are linked to price caps. So far, no restrictions have been implemented on roaming prices.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Telecommunications service providers are free to apply their general terms and conditions to consumers. Such contracts have to comply with the Federal law against Unfair Competition. Service providers have to further honour data retention obligation and the principle of secrecy of telecommunications.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers are allocated by the OFCOM.

Switch is the registry for .ch domain. Only registrars registered at Switch can allocate domains. Switch is no longer allowed to allocate domains itself.

2.17 Are there any special rules which govern the use of telephone numbers?

OFCOM issues the national numbering plan in accordance with the European Telecommunications Standards Institute's standards (ETSI).

2.18 Are there any obligations requiring number portability?

The TCA obliges the providers of telecommunication services to ensure number portability and a freedom of choice of service providers for national and international connections.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The spectrum use is regulated by the TCA. ComCom grants the correspondent licences.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

In order to use a radio communications frequency spectrum, a licence granted by ComCom is needed. The application process has to respect several principles, i.e. the principle of objectivity, the principle of non-discrimination and the principle of transparency.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The use of spectrum can be made licence-exempt only in limited cases.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The fees payable for the use of radio frequency spectrum varies according to the type of radio communication, of spectrum and of frequency range used.

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3.5 What happens to spectrum licences if there is a change of control of the licensee?

If a change of control of the licensee occurs, the change of control has to be approved by the licensing authority.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Any transfer of a spectrum licence requires the approval of the corresponding licensing authority. As soon as the transfer has been approved, the spectrum licence may be transferred. The trade of the mere use of the licence is not allowed in Switzerland. However, changes of this rigid regime may be introduced with the revision of the TCA, which may incorporate more flexibility regarding trade and sub-licensing of spectrum licences.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

On 27th June 2012, the Swiss Federal Council approved the "National Strategy for the Protection of Switzerland against Cyber Risks (NCS)". With this strategy, the Federal Council aims to minimise cyber in cooperation with public authorities, industry and the operators of critical infrastructures.

The strategy describes acting on one's own responsibility, the national cooperation between industry and authorities as well as cooperation with foreign countries as essential for the reduction of cyber risks. The strategy covers this need for action with 16 measures to be implemented by 2017. The ISB (steering body of the Swiss Confederation concerning informatics, *Informatiksteuerungsorgan des Bundes*) has the task of coordinating the implementation of the NCS in cooperation with the administration, the cantons and the business community.

The said NCS is reflected in the Federal Act on Intelligence Service (ICA) allowing the Federal police to monitor the internet proactively.

In addition, domain name registry as well as telecommunication providers are forced to implement security measures to protect their infrastructure and services on a high level.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

In principle, the contents of conversations, letters, e-mails and the facts that a communication has taken place is protected by the Swiss Constitution stating that everyone's privacy has to be respected and protected including private and family life, their home, their correspondence, their post and telecommunications, every person is entitled to protection against the misuse of their personal data.

The Telecommunications Act specifies the secrecy of telecommunications and prohibits the disclosure of data by providers to third parties. The Federal Act on Data Protection permits the processing of personal data only if it is necessary, proportionate and expedient, with the consent of the parties or if law requires it. The Federal Act on Lawful Interception regulates the obligation for providers to "divert" the telecommunications traffic of a monitored person and to keep the data for six months. The Criminal Procedure Code authorises the respective authorities to access communication data based on a Court decision.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The Lawful Interception Act governs lawful interception. Call interception in Switzerland covers fixed and mobile telephone calls, VoIP calls, emails and other forms of modern communication. Lawful interception is limited to a given list of crimes or to a search for missing persons. At the request of the Cantonal State Prosecutor, the Cantonal Court will issue a surveillance decision against an individual, which needs to be forwarded to the Post and Telecommunications Surveillance Service (PTSS). The PTSS will then notify the telecommunications service provider and require implementation of the surveillance and relay of the data. In the event of violation of the lawful interception obligations, the telecommunications service provider can face a fine of up to 10% of its average turnover of the last three years.

The costs for the equipment and installations necessary to lawfully intercept data, to retain data and to provide this data to the PTSS in the format foreseen by the technical regulations must be borne by the telecommunications service providers.

4.4 How does the state intercept communications for a particular individual?

Since 2002, a specific set of data of subscribers including Call Detailed Records (CDR) has to be recorded and saved for half a year. If requested by the penal authorities based on a corresponding court decision, the said data will be handed out.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Telecommunication providers registered in Switzerland need to fulfil a set of security requirements including encryption of data, network information, etc. Within the procedure of lawful interception or based on the Swiss Intelligence Service Act telecommunication providers may be forced to hand out encryption keys.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Telecoms or internet infrastructure operators are obliged to retain data for six months.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Anyone providing a telecommunication service is obliged to register with the Federal Office of Communication (OFCOM). The Swiss Broadcasting Corporation (SRG SSR) is licensed and receives a share of the fee charged for each household and each undertaking. The same is applicable to other licensed broadcasters with a performance mandate. A broadcaster may generally acquire

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a maximum of two television licences and two radio licences (does not apply to SRG SSR). The Federal Council may permit exceptions for the introduction of new broadcasting technologies.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

The RTVA regulates the content of advertisements, mainly, without limiting it on a certain media of broadcasting. Broadcasters have to separate advertising from editorial content. Advertising for tobacco, alcohol, therapeutic products, political or religious parties, institutions or people representing them are limited or prohibited. SRG SSR has further limitation or obligations due to its special status. Therefore, content regulation is determined by what licence a broadcaster holds and not by what medium it uses for broadcasting.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

Three types of licences can be differentiated: (1) SRG SSR holds a constitutional programme service mandate; (2) regional licenced broadcaster with a performance mandate; and (3) non-licenced broadcasters registered with OFCOM.

Due to its special status, SRG SSR has the obligation to meet several requirements regarding programme quality, diversity, content, etc., as detailed in the RV or the licence. A broadcaster with a performance mandate has a lesser obligation and broadcasters without a performance mandate are only obliged to respect general constitutional principles.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences can be transferred after approval of DETEC. An economic transfer of the licences is deemed a transfer in the sense of the RTVA. This is the case, when more than 20% of the share capital, nominal capital or registered capital or where applicable the participating capital or voting rights are transferred.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Telecommunications service providers have not been held liable for content carried over their network so far. There is no specific regulation in place so far making the telecommunications service provider responsible for content of the internet. However, a provider of public accessible chats was made liable for content violating personal rights. An explicit liability of providers, however, has not yet been stated by Courts so far. With the revision of the TCA, telecommunications service providers may be subject to administrative sanctions, should they not block the access to certain illegal content with penal character.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

There are no legal provisions obligating access or hosting service providers to remove infringing information so far. Content owners are referred to the courts, which can order the removal of certain contents by judgement.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The revision of the TCA obliges telecommunications service providers to inform the customers publicly if they transfer information in a technically or economically different way during carriage. They shall provide public information on the quality of their telecommunications. The Federal Council determines the information telecommunications service providers have to publish. The OFCOM can publicly inform on the various telecommunications services provided.

So far no rules on net neutrality have been put in place.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Telecommunications service providers have to implement the access to certain sites as published by the Federal Authorities. These list of sites are linked to illegal penal content.

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Chapter 28

Taiwan

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

There are three major operators in Taiwan's telecoms market: Chunghwa Telecom; Taiwan Mobile; and FarEasTone Telecom. These three operators provide integrated telecoms services comprising fixed-line, mobile and broadband networks, and the market shares are over 70% of total telecoms services. Currently telecoms services are liberalised, except the mobile/wireless telecoms services, which have to be allocated available frequency. In general, foreign investment is only capped by certain restrictions on Type I telecoms business and no further restrictions on Type II telecoms business apply.

In the market of terrestrial television, in addition to the public broadcasting group (so-called Taiwan Broadcasting System, including CTS and PTS), there are three other stations (TTV, CTV and FTV). In the cable TV market, there are 62 system operators and three programme transmission systems, and most of the system operators belong to the five major multi-system operators (Kbro, CNS, TBC, TFN and TOP), acquiring 90% of the market share. There are a few direct broadcasting satellite operators, but they cannot compete at all with the cable market. In the programme channel market there have been more than 300 landing licences issued as of 30 June 2017. Foreign investment, either direct or indirect, is subject to legal restrictions on cable and channel providers.

The major modes of internet access service are ADSL, FTTx and cable modem. Chunghwa Telecom is the largest provider of ADSL/FTTx and acquires about 70% of the market share; the leading cable modem operators are Kbro and CNS, acquiring about 20% of the market share. In the mobile market, an official statistic suggests that as of 30 June 2017, 3G and 4G services have a total of more than 30 million users. 4G LTE licences for mobile broadband services in the frequency bands of 700MHz, 900MHz and 1800MHz are available. Five operators – Chunghwa Telecom, Taiwan Mobile, FarEasTone, Asia Pacific Telecom, and Taiwan Star – have put the 4G market in fierce price competition since 2015. There were 20 million subscribers to the LTE-Advance service until the end of June 2017. The monthly data transmission for a 4G user amounts to 9.3GB on average. This is all thanks to the *National Communications Commission*'s aggressive number portability policy and the "all-you-can-eat" fee plan heavily marketed by the operators.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Fundamental Communications Act was created in January 2004 to address the goals to be achieved in the course of digital convergence. Functionally, there is the Telecommunications Act, the Radio and Television Law, the Cable Radio and Television Law, and the Satellite Broadcasting Law respectively, which draw lines in between respective transmission platforms, though the *National Communications Commission* (NCC) has been exercising its exclusive power granted by the Fundamental Communications Act to have regulatory reform by converging all of the above platform regulations into a single legislation. There is no specific regulation for the internet. It is noted, however, that the internet, in relation to audio-visual content distribution, remains a grey area in NCC's policy.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The National Communications Commission (NCC) is the authority on telecoms and audio-video media distribution, and the internet, except for the following:

1. The Ministry of Transportation and Communications (MOTC) has exclusive power on spectrum allocation, the numbering plan and any relevant policy planning, such as IP addresses, based on a decision entered into by the Executive Yuan (the Cabinet) in 2007.
2. The Ministry of Culture is the co-regulator in the fields of radio and television regardless of transmission type.
3. The NCC has been appointed by the Executive Yuan as the regulator for personal data protection in relation to internet matters.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

In the telecoms sector, foreign direct investment in single Type I telecoms operators shall not exceed 49% of total equity shares and shall not be more than 60% of direct and indirect foreign investments.

In the media sector, foreign ownership is prohibited in terrestrial TV stations and radio stations. For investment in the cable system

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operators, the total foreign ownership must be below 60%, and the foreign direct investment shall be for legal entities only and may not exceed 20% of the total shareholding. Foreign satellite broadcasters, channel operators, content providers and Direct to Home (DTH) service operators are able to receive landing licences either by set-up of a branch company or appointment of local agents for compliance with relevant NCC regulations. In cases where foreigners invest in Taiwanese satellite broadcasting businesses, a cap of 50% on total equity shares shall apply.

No restriction is placed on foreign investment in internet-related business.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Taiwan became a member of the World Trade Organisation in January 2002. Taiwan made commitments under the GATS/GATT regarding telecommunications and adopted and implemented the telecoms reference paper later by the further liberalisation of the telecoms sector and enacting amendments to respective telecoms law, as well as to broadcasting regulations.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Telecoms businesses are divided into facility-based operators (Type I) and service-based operators (Type II). Type I telecoms operators shall obtain concessions prior to the initial operation from the regulator and their behaviour is under heavy regulation. Type I telecoms businesses, including fixed-line networks, mobile and wireless broadband access, shall abide by respective rules and regulations promulgated by the NCC. Except for those which are defined as Special Type II Businesses, such as VoIP and International Simple Resale, Type II telecoms operators require general permits from the NCC prior to launching their services and are also subject to light regulation.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The regulatory authority is the NCC and the competition law authority is the Fair Trade Commission (FTC). Both are well-defined, independent regulators. The NCC executes *ex ante* regulation, while the FTC is more *ex post* as the watchdog for unfair competition, even though the FTC also enjoys a parallel power in approval of mergers among the telecoms operators as mandated under the Fair Trade Act.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Yes. As for decisions related to approval, permits giving licences and penalties, licence-holders and interested parties may appeal to the Taipei High Administrative Court. Appeal to the Supreme Administrative Court would be the last resort if this was unsuccessful.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Except for Type II operators that require general permits from the NCC prior to service launch, most of the licence-holders in the field of telecoms and audio-video media distribution, including Type I telecoms operators and TV service providers (terrestrial, in-land cable, and satellite), are subject to the scrutiny of the operation plan and receive special concessions from the NCC before launching on the market.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

It must include basic information about the operator, a brief of its operation plan, which items may be designated by the NCC from time-to-time, the date of the service launch and details of the telecoms facility/equipment to be applied in the operation. The NCC also requires prior review of the terms and conditions of the user's agreement.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Type I telecoms businesses are further detailed into three categories: fixed-line networks; mobile/wireless networks; and satellite communication networks. The fixed-line network business licences so far include integrated network, local phone, long-distance phone, international phone and circuit leasing business, and the duration of the above licences ranges from 15 to 25 years. The mobile/wireless network business licences include mobile communication (GSM), low-tier wireless phone, third-generation mobile communication (3G), wireless broadband access (WBA) and mobile broadband business. The duration of mobile licences is generally between 10 and 15 years. All of the above individual authorisations or licences are subject to the prohibition of transfer and trading. Mergers and acquisitions among Type I operators require the prior approval of the NCC according to Article 15 of the Telecommunications Act.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

According to Article 32 of the Telecommunications Act, Type I telecoms operators may use public and private land and buildings for the establishment of conduit infrastructure and terminal equipment. Governmental authorities shall not reject a request to use public land or buildings without due cause. If any such use of land or buildings causes material damage, appropriate compensation shall be issued. The location and manner of use shall be the least harmful to governmental entities and owners, occupants or users of such land or buildings.

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Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Article 16 of the Telecommunications Act provides that, unless the law specifies otherwise, any request for network interconnection between or among Type I operators shall not be rejected. The arrangement of network interconnection shall follow the principles of transparency, reasonableness, non-discrimination, network unbundling and cost-based pricing.

The agreement of network interconnection among telecoms operators shall be reached within three months or any involved party may request the NCC to arbitrate the dispute. With respect to network interconnection, tariff calculation, negotiation, mandatory terms within interconnection agreements, arbitration procedures, and matters requiring compliance between or among telecoms operators, the NCC has the authority to enforce the Regulations Governing the Network Interconnection among Telecommunications Operators.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

All of the signed interconnection contracts, including prices agreed upon by the parties, shall be reported to the NCC for its record. The NCC, at its sole discretion, may disclose a part or the whole of the interconnection agreements entered into by the dominant market player and other telecoms operator(s).

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The charges for interconnection and/or network access, in general, are determined through negotiation between the parties of the network interconnection. Calculation of the access charge shall meet the principles of cost orientation, be fair and reasonable, and be of a non-discriminating nature. Among other things, the access charge of a dominant Type I telecoms operator market player shall be figured out pursuant to the following principles in accordance with the cost of the applied relay, transmission and switching equipment, which shall be reviewed annually: (1) the access charge shall be determined by the costs of the unbundled network elements in service; and (2) the cost shall be figured out on the basis of TELRIC (Total Element Long Run Incremental Cost). The access charge figured out by a dominant market player in a specific Type I business must receive prior approval from the NCC. Likewise, in the case of any amendment or change, NCC approval is required.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Accounting separation applies to all Type I telecoms operators in accordance with Article 19 of the Telecommunications Act. Further, they must refrain from cross-subsidisation to hinder fair competition. The NCC has made several attempts to introduce concepts of both functional separation and legal separation against Chunghwa Telecom, the dominant player in the fixed-line network in draft amendments to the Telecommunications Act, but has not yet had any success.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Chunghwa Telecom (CHT), formerly a state-owned company prior to August 2005, has the only existing island-wide copper local loops. The NCC announced on 24 December 2006 that CHT's copper local loop facility bottlenecked access and forced shared use and lease to its rivals on a cost basis. On the other hand, the NCC has a very different measure on cable TV operators by opening the franchise market in order to promote multiple network competition in each cable franchise market.

The NCC holds a neutral position as to the interconnection and access of next-generation networks while negotiation among the operators in existing business practice is upheld. In addition to a massive construction project sponsored by the central government in 2004 for island-wide ducts connecting major cities – the so-called "M Taiwan project" – in order for connection and access to meet the purpose of FTTB (fibre-to-the-building), local municipal governments also endeavoured to invite investment from the private sector into the creation of similar IP-based networks by making ducts and poles available for use to newcomers. Taipei City, the capital of Taiwan, announced an ambitious Build-Operate-Transfer (BOT) project commissioned to an international consortium in January 2012, which aimed to achieve 80% penetration of FTTH (fibre-to-the-home) in Taipei City by the end of 2015. A total capital expense of approximately US$1.3 billion was estimated for the operation of the 25-year franchise. The *status quo* is still a struggle and the NCC has planned to take an active approach for bringing an upgraded network into the local market by further liberalisation of network deployment.

According to Article 31 of the Telecommunications Act and the Regulations Governing the Fixed Network Business, when a Type I telecoms operator engages in constructing the infrastructure for lines/pipes/ducts/poles for its fixed networks, it may request its lines/pipes/ducts/poles to be located at the facilities where there is a bottleneck of telecommunications networks, at the expense of the requested operator of such facilities.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

All of the Type I telecoms operators (including fixed-line, mobile/wireless and satellite networks) are currently subject to retail price control under the price cap regulation imposed by the NCC according to Article 26 of the Telecommunications Act. Any pricing adjustment, regardless of increase or decrease, and promotional plans of primary tariffs of the dominant players, shall be submitted to the NCC for approval 14 days prior to the scheduled effective date of such adjustment. Following the approval, the adjustment and promotional plans shall be published for public notice and then become effective seven days after the announcement. Chunghwa Telecom has been the dominant player in the fixed-line network service market and it, together with Taiwan Mobile and FarEasTone, are dominant players in the 3G service market.

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2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Other than the Consumer Protection Law, there is no special rule applying to the provision of electronic communications services to consumers. The NCC, however, actively forces service providers of electronic communications services to adopt terms and conditions in favour of users and consumers by publishing guidance on the subscription agreement and the user's agreement, followed by a regulatory review of implementation, which may be criticised from time to time by consumers.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The Ministry of Transportation and Communications (MOTC) has been appointed by the Executive Yuan, subject to Article 3.2 of the Fundamental Communications Act, as the authority for allocation of telephone numbers and network identifying codes. Further to its numbering plan for 2001 through to 2011, the MOTC in early 2012 announced its numbering plan for the next 10 years until 2021. The NCC is responsible for the number assignments and management regulations.

2.17 Are there any special rules which govern the use of telephone numbers?

The NCC followed the Regulation Governing the Telephone Numbers previously ordered by the Directorate General of Telecommunications under the MOTC, the former telecommunications authority authorised under the Telecommunications Act, in 2003, and further amended the above regulation in 2010 and again in 2013 to administer the use of telephone numbers. All Type I telecoms operators and certain Type II telecoms operators, such as those who operate simple resale services, are eligible for applying for telephone numbers. For non-profit purposes, a person or a legal entity may apply for the use of telephone numbers for the test of new telecommunications services or technology. The NCC, at its discretion, may grant the use of telephone numbers upon the request of government agencies, non-profit organisations or public utilities for public interest.

2.18 Are there any obligations requiring number portability?

Number portability service in the local phone service has been available since November 2003, and mobile number portability became available as of 1 January 2005. The Regulation Governing the Number Portability, which was last amended by the NCC in June 2014, provides detailed do's and don'ts in relation to number portability. For example, number portability is not available for the cross-service category (fixed-line to mobile or *vice versa*). Further, the number portability of local phones is available in the same code area.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Absent a specific law on the use of radio spectrum, the management and planning of radio spectrum has been regulated under general authorisation given in accordance with the Fundamental Communications Act, based on a decision entered into by the Executive Yuan in 2007 to MOTC. The Office of Post and Telecommunications under the Ministry of Transportation and Communications (MOTC) is responsible for the planning of spectrum allocation, while the NCC administrates details like spectrum management, frequency assignment and radio interference.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Pursuant to Article 48 of the Telecommunications Act, the NCC shall regulate radio frequency, power, mode of transmission, radio station identification signals and call signs, and other radio spectrum-related matters. The NCC enacts regulations governing the planning and allocation of radio frequency, application procedures, principles of assignment, termination of approval, administration of radio frequency, handling of interference, the standard definition of interference and regulations related to the supervision of radio waves. The NCC further mandates the term of utilisation of frequency, and establishes a fee schedule to collect usage fees from radio frequency users.

Spectrum assignment shall be made by auction or open bid except for the following, which shall take the beauty contest approach:

1. radio frequencies for: the military; the police; navigational aid; ships; amateur radio; government telecommunications; industrial, scientific, medical and low-power radio frequency devices; academic experiments; emergency aid and rescue; and other benevolent or public uses;
2. radio frequencies for: mobile communications networks; satellite communications networks; radio broadcast stations or TV stations whose operation is based on the utilisation of specific radio frequencies, which shall be designated at the time of issuance of operation permit or franchise licences, or networks thereof could not function; and any radio frequency increased for further improvement of quality of local telecommunications; or
3. radio frequencies which could be used repeatedly under certain conditions of use, for wireless local loop of fixed-line networks, satellite links or wireless microwave links.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Certain radio frequency devices, such as Wi-Fi and Bluetooth, are free of licence on the use of specified open spectrum. A walkie-talkie is another licence-exempt example. These devices, however, shall meet the requirements of type approval regarding the technical specification of output power, modulation technique, operating frequency, etc. The National NCC concluded its review on the spectrum assignment plan to uses of low tier radio frequency equipment on 22 April 2016 and released more spectrum for the Internet of Things. It is a follow up to a previous invitation for public consultation from manufacturers of wearable technology mainly for a possible plan on frequency allocation for the Internet of Things, which would support a lot of applications such as smart meters deployed in the smart electric grid, wearable devices, road traffic surveillance and traffic control systems. Previously, in September 2015, the NCC decided low-power RF devices, notably a wireless mouse, keyboard, ear-set, selfie stick, stylus pen, and object locator applying Bluetooth in the spectrum range of 2.4GHz to 2.4835GHz

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shall be licence-exempt; therefore, no prior type approval will be required.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The fees for the use of radio frequency spectrum are calculated every year pursuant to the Charge Standard of the Utilisation Fee of Radio Frequency. The standard fee varies for permitted types of communications businesses and the frequency spectrum applied; despite that, the fees for the usage of academic experiments, navigational aids, meteorology radars, rescue, military dedication, or emergency medication may be exempt.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Any change of control of the licensee is required to receive the NCC's prior approval subject to respective conditions set forth in various communications regulations.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

For all existing licences, trading or sub-licensing is absolutely not permitted. However, NCC initiated its first attempt by enacting the regulation on mobile broadband business in May 2013, which would allow the transfer usage right to awarded frequency among the licensed mobile broadband operators, subject to Article 48 of the Telecommunications Act and the NCC's approval. For example, the application of bid winners or operators for the assignment of frequency usage rights will not be granted in any of the following circumstances:

- The bandwidth as assigned is not in 5MHz multiples for uplink and downlink.
- The remaining bandwidth of the assignor falls below 10MHz for uplink and downlink.
- The total bandwidth of the assignee after the assignment exceeds one-third of the total mobile broadband business bandwidth.
- The total 700MHz and 900MHz bandwidth of the assignee after the assignment exceeds one-third of the total 700MHz and 900MHz bandwidth of mobile broadband business.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Pending official review of the draft Cybersecurity Act in Congress, the NCC is coordinating with the Executive Yuan on an integrated management scheme to communicate with both public and private sectors for best practice to be followed before the binding laws come into effect.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Communication Security and Surveillance Act promulgated in 1999 defined the scope of the government's access to private communications, including, but not limited to, text, voice, pictures, graphics, and other messages carried through electronic communications, and detailed how the due process must be achieved. In the meantime, Article 7 of the Telecommunications Act provided parallel support allowing legal interception made according to the above authority.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Pursuant to each communications regulation ordered by the NCC and the enforcement rules for the Communication Security and Surveillance Act, all licensed telecoms operators which physically operate their telecommunications facilities and/or networks must comply with demands issued by applicable enforcement authorities by providing dedicated lines to the specific facility for interception authorised by appropriate court orders. The licensed operators are required by the above enforcement rules to give cooperation for recording and retrieving phone calls, short messages, emails and other forms of electronic communications.

4.4 How does the state intercept communications for a particular individual?

Police, prosecutors, and the national security agency may only apply for court orders of surveillance in relation to investigations on specific crimes, such as treason, corruption, money laundering, smuggling, bribery, insider collusion pool, organised crime and other felonies that carry a sentence of not less than three years in prison. The approved surveillance shall be at all times subject to competent court review in order to determine if it should be called off or terminated. Other than in the case of treason (where the surveillance may last as long as one year), any surveillance proceeded under court approval can last 30 days at the most.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

As stated above, all licensed telecoms operators are required under Article 14 of the Communication Security and Surveillance Act and Article 26 of its enforcement rules to render every assistance in the surveillance, which naturally includes provision of encryption keys and decoding software to the satisfaction of the Investigation Bureau, commanded by the Ministry of Justice, or National Police Administration, commanded by the Ministry of Internal Affairs. Subject to the same regulation, all licensed operators must be equipped with wire-tap capabilities acceptable to the aforementioned agencies and then approved by the NCC prior to receiving their operation licences.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

All Type I telecoms operators are obliged to retain data, including the telecommunications number, and the date and time of communication for the calling and called parties recorded by the telecommunications system. The retaining period varies for respective telecoms services: (1) three months for local calls; (2)

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six months for international and long-distance calls; and (3) six months for mobile phones. Type II operators shall retain the data for a period of one to six months, subject to detailed requirements made by the NCC, which may include VoIP, log-in and log-out of broadband access, the IP addresses of free email accounts and newsgroups, and communication records of emails, etc.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The Radio and Television Act, the Cable Radio and Cable TV Act, and the Satellite Broadcasting Law each authorise the NCC with the exclusive power to licence and grant entry to terrestrial, cable and DTH markets. Heavy regulations are applicable to the distribution of audio-video media across the above platforms.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Despite its intent to follow the EU approach in distinguishing between linear and non-linear content, the NCC has not had a clear policy toward content delivered over the internet or similar platforms. All of the licensed platforms as mentioned above in question 5.1, including the walled-garden IPTV service provided by telecoms carriers, are required to carry only content offered by those who have passed scrutiny and received the proper content provider licences from the NCC. Internet TV and/or Over-the-Top (OTT) services are grey areas under the NCC's current content policy – the NCC has responded that OTT services available via the internet would not be regulated while the same content available on platforms other than the internet would be subject to prior licences. Nevertheless, the NCC's position towards regulation of such internet services is still not clear.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

In general, licences for the distribution of audio-visual media are regulated on the basic fact of holding and controlling physical distribution platforms, including terrestrial TV stations, radio stations, cable radio and cable TV systems, and satellite TV transmission systems. The NCC, since its establishment in 2006, has strengthened its licence control beyond these platforms to content providers. All of the above licence-holders are required to observe detailed programme and advertisement regulations set by the NCC, which basically contain the following criteria:

1. that the content shall not violate compulsory or prohibitive regulations under the law;
2. that the content shall not impair the physical or mental health of children or juveniles; and
3. that the content shall not disrupt public order or adversely affect good social customs.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

No licences are assignable. The NCC conducts scrutiny on licence-holders, who must always be exactly the same as those approved originally on the official record.

Change of control of the licensee is required to receive the NCC's prior approval subject to respective conditions set forth in various communications/broadcasting laws.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Local courts have upheld the defence made by telecoms operators and internet service providers on the grounds of common carrier principles as provided in Article 8 of the Telecommunications Act and the "safe harbour" provision under Chapter 6-1 of the Copyright Act.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

The "safe harbour" mechanism imbedded in Chapter 6-1 of the Copyright Act exempts internet service providers (ISPs) from indirect liabilities arising from customers engaged in illegal file-sharing or other activities. "Notice and Take Down" is one of the compliances ISPs must make in order to be protected by "safe harbour" provisions.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

It cannot be disguised that net neutrality has been troublesome in practice between the NCC and most of the telecoms operators. Net neutrality is not found in the Telecommunications Act, yet it is to be clarified by the NCC.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

There was no such mandatory requirement until November 2011. The Minor's Welfare and Rights Protection Law, in its latest amended Article 46, placed on ISPs a direct responsibility to assist relevant authorities with internet content surveillance. ISPs shall take all necessary measures to restrict minors' access to certain sites or content or remove the content upon receiving from a competent authority notice about the identified internet content or links determined harmful to the physical and mental health of minors.

Consumer VPN services are not blocked unless they are subject to specific proper notices from relevant authorities.

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As Taiwan's premier legal service provider in telecoms and media, Shay & Partners enjoys an excellent reputation for its specialised advice to both domestic and foreign clients in the telecoms and media sectors.

The TMT team at Shay & Partners comprises up to 12 experienced professionals who are senior lawyers specialised in communications and media regulations and privacy law, as well as litigation skills, and those technology consultants who have sufficient industry background to support clients in their respective strategy implementations and plan deployments.

Shay & Partners also occupies a leading position in the field of Taiwan's IT legal service. As one of the pioneers in developing a legal practice focused in the area of electronic commerce, Shay & Partners advises a large number of service providers across software, hardware, and telecoms platforms on cloud computing and privacy protection issues.

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Thailand

Tilleke & Gibbins

David Duncan

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Thailand's two major state telecommunications operators – CAT and TOT – formerly held monopolies on telecommunications service in Thailand. Traditionally, they provided some services themselves, and they each granted concessions to private operators. The law has made a distinct shift away from the concessions regime, and replaced it with a licensing regime administered by the National Broadcasting and Telecommunications Commission (NBTC). However, some concessions still remain.

There are currently three major private mobile carriers – AIS, DTAC and True, all of which vigorously compete. In addition, each of CAT and TOT host a number of MVNOs. Landline services are provided primarily by TOT, True, and TT&T, but VoIP services are a source of growing competition.

Terrestrial broadcast television has largely transitioned to digital, though some analogue broadcasters remain. As for cable and satellite television, there are several operators in the Kingdom, but the primary operator is TrueVisions. CTH was another significant operator, but it has ceased operations.

There are numerous internet service providers, but network infrastructure is owned by a small number of major telecommunications operators (both state and private).

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The primary legislation relevant to telecommunications and audio-visual media distribution are:

- the Radio Communications Act B.E. 2498 (as amended);
- the Telecommunications Business Act B.E. 2544 (as amended);
- the Broadcasting Business Act B.E. 2551;
- the Frequency Allocation Act B.E. 2553 (as amended);
- the Computer Crimes Act B.E. 2550 (as amended); and
- the Film and Video Act B.E. 2551 (as amended).

There is a considerable body of administrative regulations and notifications promulgated under these laws.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

Telecommunications is primarily subject to regulation by the NBTC and the Ministry of Digital Economy and Society (MDES), including the National Information Technology Committee and the National Electronics and Computer Technology Centre. Audio-visual media distribution is primarily regulated by the NBTC, and the Censorship Board, which is a unit of the Ministry of Culture.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

In the telecommunications and internet space, Type 2 and Type 3 licences are unavailable to applicants considered "foreign" as determined according to the provisions of the Foreign Business Act. In addition, these licensees are obligated to observe the NBTC Notification on Prevention of Foreign Dominance. In contrast, Type 1 licences are available regardless of the level of foreign ownership in the applicant; the NBTC Notification on Prevention of Foreign Dominance is not applicable to them. Thus, foreign ownership and control is effectively limited to less than 50% for facilities-based telecommunications operators. Telecommunications operators that would operate on a non-facilities basis, however, can be wholly foreign-owned, provided they do not require a Type 2 licence for the intended services.

As for media, foreign ownership and control of a broadcasting licensee are each limited to 25%.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Thailand has been a member of the World Trade Organisation since

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1 January 1995 and has made commitments under GATS regarding both value-added services and basic telecommunications.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of telecommunications/electronic communications networks and services is subject to the aforementioned laws, which provide for regulation primarily by the NBTC. The MDES also has a significant role in regulation.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The Trade Competition Commission and the Committee on Prices of Goods and Services are competition and fair trading regulators of general jurisdiction. These bodies are nominally independent, but their members are appointed by the government. It should also be noted that the NBTC has also issued competition regulations specific to telecommunications.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions of the NBTC can be appealed within the organisation itself, subject to the Administrative Procedure Act. Accordingly, further appeal to the Administrative Court would also be possible, depending on the circumstances.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Primary authorisations take the form of Telecommunications Licences, which are categorised as Type 1, Type 2 and Type 3. Each Telecommunications Licence specifies the type(s) of telecommunications business in which its holder can engage, and it also typically has a range of different conditions and endorsements.

1. **Type 1 Licence**: Type 1 licences are for telecommunications operators that provide service without their own networks.
2. **Type 2 Licence**: Type 2 licences are for telecommunications operators that provide service either with or without their own networks, for use by a limited group of people, or that have no significant impact on competition, public interest and consumers.
3. **Type 3 Licence**: Type 3 licences are for telecommunications operators that provide service with their own networks, for use by the general public or which may impact competition, public interest or consumers.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Subject to certain narrow exceptions, individual authorisations – in the form of the licences described in the response to question 2.5 – are required to lawfully engage in any telecommunications business.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The subject matter of each form of individual authorisation is described in the response to question 2.5.

Type 1 licences are valid for five years, Type 2 licences are valid for 15 to 25 years for operators with their own networks or five years for those without their own networks, and Type 3 licences are granted for periods of 15 to 25 years. Licences are renewable, subject to compliance with regulatory requirements.

Telecommunications Licences are not transferable.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The NBTC administers regulations concerning rights of way for erecting poles, laying conduit or cables and installing equipment for providing telecommunications services. Depending on the type of easement required, a notice may be sufficient – otherwise, it may be necessary to negotiate an agreement. The regulation takes the general approach that such agreements should be reflective of equality, fairness and impartiality.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

There are several regulations on network interconnection and access. Essentially, licensees operating their own telecommunications networks must:

1. permit other licensees to interconnect with their networks;
2. permit other licensees to access their telecommunications networks as a means to access their networks;
3. provide transit services to other licensees through their telecommunications networks;
4. provide roaming services to other telecommunications service providers;
5. offer and provide unbundled network services and essential facilities of their own networks to permit other licensees' access or interconnection with their networks; and
6. permit other licensees to access and employ technical specifications on their telecommunications network access, interfaces and protocols or necessary technology for interoperability, in order to facilitate access or interconnection with their networks.

Licensees with their own telecommunications networks, however, may refuse to permit other licensees access to their networks if their existing telecommunications networks are insufficient to accommodate other licensees. In addition, access may also be refused if there are technical difficulties which may, as a result, cause interference in, or otherwise obstruct, the telecommunications business.

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In the case of a dispute, parties may apply to the Dispute Resolution Committee of the NBTC. Detailed procedures are set out in regulations for this purpose.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Licensees with their own telecommunications networks are required to provide Reference Access Offers and Reference Interconnection Offers, with respect to access or interconnection by other licensees.

Licensees must also prepare information on the calculation of charges for network access, interconnection and unbundled components. This information is to be submitted at the time of a licence application and periodically, and it is subject to consideration by the NBTC.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Standards and pricing methodologies are set in regulations administered by the NBTC. In principle, the approach is that reasonable access or interconnection charges are to be calculated only for each network element used in providing the given service. Other expenses not directly relating thereto are not to be included in the calculation. The NBTC has the authority to order licensees to restructure their pricing, and to submit it for NBTC approval. The NBTC also has the authority to regulate each step of the procedure for access/interconnection and/or to determine network access or interconnection charges that it deems appropriate.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

See response to question 2.11.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

As a general matter, operators of broadband networks are subject to regulation in the same way as operators of other telecommunications services, and such operators likewise generally have the same rights.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Regulations administered by the NBTC impose maximum pricing for certain services.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Regulations impose requirements in relation to service contracts, tariffs and service charges, as well as protection of consumer rights in the areas of personal data, privacy and freedom of communication via telecommunications networks. Licensees are also required to establish separate call centres to receive complaints, to establish procedures for receiving and considering user complaints, and to comply with regulatory requirements in relation to handling complaints, including an escalation process in which resolution is pursued within particular deadlines.

Licensees must also meet Universal Service obligations, (i.e. by making specified contributions to the Universal Service Fund).

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and special codes are allocated by the NBTC, in accordance with regulations and the numbering plan.

2.17 Are there any special rules which govern the use of telephone numbers?

Telephone numbers can only be allocated to telecommunications licensees for use in their provision of telecommunications service, and there are extensive regulations governing such allocation. Generally, telephone numbers can only be used in providing service consistent with the numbering plan.

2.18 Are there any obligations requiring number portability?

Service users have the right to mobile number portability, and service providers are generally prohibited from acting to obstruct or impede the porting of mobile numbers to other service providers, though there are exceptions to accommodate technical and other issues. The relevant notifications set out considerable detail as to the mechanics.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The NBTC is the primary regulator of spectrum use.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Radio frequency spectrum is allocated pursuant to the Frequency Allocation Act. For commercial spectrum usage, it provides for the NBTC to consider and grant permits for use of spectrum by auction, according to procedures and conditions the NBTC may set.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Certain categories of spectrum use are licence-exempt; the conditions depend on the applicable use.

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3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

For commercial use, spectrum is allocated by auction, with pricing determined by the auction process.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

A licensee must maintain conformity with its licence conditions in order for the licence to remain valid. In this regard, a change in control could result in breach of said conditions (e.g., if the foreign shareholding ratio was breached). Generally, a licensee must notify the NBTC in writing of a change of control, and the NBTC may instruct the licensee to take particular actions as the NBTC deems appropriate.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Pursuant to the Frequency Allocation Act, a permit to use frequency waves for a telecommunications business is the exclusive right of the permit holder and is not transferable. The holder of a permit to use particular frequencies for a telecommunications business must operate the business itself. It cannot assign management of the business, in whole or in part, to someone else, or authorise other persons to operate the business on its behalf.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The Cybersecurity Bill, which has been approved by the Cabinet but remains pending, would establish a National Cybersecurity Committee and a new state agency, the Office of the National Cybersecurity Committee. The Committee would have the responsibility to determine how to respond to serious cyber threats and to be the centre of operation in such IT calamities (save for matters of military security) and to cooperate with other state bodies and private entities for this purpose, among other related responsibilities. The Office of the National Cybersecurity Committee would be responsible for implementing the Committee's policies, as well as related responsibilities specified in the Bill.

As written, the Bill would compel state agencies to follow the Committee's plans and policies, and it sets out mechanisms for achieving that. It also features a reporting mechanism by which state agencies and/or designated persons within each state agency would feed information back to the Secretary of the Committee, so that the Committee could determine what further actions to take in response to particular cyber threats. Further, where it is necessary for the purpose of maintaining Cybersecurity, in a circumstance where there may be an effect on financial and commercial stability or national security, it would empower the Committee to order a state agency to take particular actions and to report as the Committee may instruct.

It is envisaged that the Minister would appoint officials to perform under the Act, and that they may be authorised by the Secretary of the Office to issue letters to ask questions or to request a state agency or any person to give testimony, submit a written explanation, or submit materials for inspection or information, all within the scope of the Act, or to request state agencies or private entities to facilitate the Committee's performance of its duties.

It would also provide for officials to be empowered to access communications information, whether in the form of post, telegram, telephone, fax, computer, or any mechanism or device for electronic communication or telecommunications, for the purpose of cybersecurity. However, the law contemplates that the Council of Ministers would promulgate rules for officials to follow in accessing such information, presumably for the purpose of addressing privacy concerns. The law also contains provisions by which to protect such information and to prevent its disclosure, except in cases of prosecution under the Act, abuse of power, or as otherwise authorised by the court.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

In principle, Thai law protects communications from access, interception and disclosure, but it provides certain exceptions for government authorities, particularly in cases that have national security implications, or cases that concern public order or good morals of Thailand. The new Constitution contains provisions on privacy, which translate:

A person shall enjoy the rights of privacy, dignity, reputation, and family.

An act violating or affecting the rights of a person under Paragraph One, or the use of personal information for benefit by any means shall not be permitted, except by virtue of the provisions of the law specifically enacted as deemed necessary for the public interest.

At this stage, it remains uncertain whether these provisions will allow for a private cause of action, or if they will be interpreted to be aspirational.

In any case, in the normal course, exceptions allowing access by governmental authorities apply through the regulatory framework applicable to information technology service providers (through the Computer Crimes Act) and the regulatory framework applicable to telecommunications operators (through the Telecommunications Business Act). In addition, special powers are available to certain government officials handling certain types of cases under the Special Investigation Act, and in emergency situations, under the Emergency Decree on Public Administration in a State of Emergency. Each is explained below.

Computer Crimes Act

The Computer Crimes Act empowers competent officers of the MDES to send enquiry letters, summon concerned persons for interrogation, and request statements, documents, computer data, computer traffic data, and evidence from service providers (as defined in the Act). These officers can also order service providers to hand over certain data pertaining to users, which service providers are obligated to keep, under the law.

In addition, the officers can take further actions, but only with a court order. These include copying computer data or computer traffic data, ordering a service provider to hand over computer data, computer traffic data, or devices, examining and accessing computer systems, computer data, computer traffic data, or devices, decrypting communications, ordering a service provider to decrypt communications, ordering a service provider to assist with decryption, and seizing/attaching a computer system, as necessary. Ministerial regulations promulgated under the Computer Crimes

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Act set out the specific requirements that each service provider is required to meet, in terms of data retention.

It is important to be aware that the Computer Crimes Act distinguishes between content data and non-content data. As a general matter, a court order is not required to access or obtain non-content data – a competent officer is already authorised to request such data from service providers or other relevant persons. While the Computer Crimes Act does not specifically use the term "intercept" when describing the authorities of the MDES with respect to these issues, such activities could be regarded as included within an officer's authority to examine and access computer systems, computer data, computer traffic data, or devices, as referenced above. While there is no court decision to offer guidance on this point, it is our view that a competent officer's authority extends to both stored data and those in transmission.

As noted above, the Computer Crimes Act authorises a competent officer to decrypt encrypted computer data, to order concerned persons to decrypt it, and/or to order concerned persons to cooperate with a competent officer in decrypting it, for the purposes of investigating an offence under the Act. Moreover, the Computer Crimes Act purports to apply both domestically and overseas, and compliance obligations are not only applicable to certain licensees. Rather, a competent officer has the authority mentioned above to order any concerned person to decrypt data or allow access to a computer system, among other authorities under the Act.

Telecommunications Business Act

The Telecommunications Business Act imposes certain obligations on telecommunications licensees. Through this regulatory framework, telecommunications licensees are obligated to comply with rules set by the NBTC. Pursuant to regulations under this Act, telecommunications licensees are obligated to retain certain data on service users, to store it according to regulations for certain periods of time, and to provide such data to the Office of the NBTC, on request, for the purpose of supervision of the telecommunications business by the NBTC and the Office of the NBTC. While there are presently no regulations explicitly requiring standing 'back doors' for easy government access to communications (whether in transit or stored), regulatory framework would accommodate the imposition of such a requirement.

Special Investigation Act

The Special Investigation Act generally applies to alleged criminal violations of certain laws, which are unusually complex, relevant to national interests, involve influential people or certain officials, or cases otherwise selected by the Special Case Board. With respect to data interception or access, the Special Investigation Act requires Special Case Inquiry Officials to obtain a court order prior to access and acquisition of any documents or information in transmission through various means of communications which have been or may be used to commit a Special Case Offence (as defined in the Act). Under this Act, the competent officer would need to file a petition requesting the court to issue an order authorising such access or acquisition of data.

Emergency Decree on Public Administration in a State of Emergency

The Emergency Decree, *inter alia*, provides for expanded investigative powers usable in the event of an emergency declaration made by the Prime Minister. This Decree gives broad powers to the Prime Minister to act in virtually any way necessary to maintain public order or otherwise maintain control in emergency situations. In such event, the Prime Minister can, among other actions, authorise a competent official to issue an order to inspect any means of communication or issue a notification prohibiting any act or instructing the doing of anything necessary for maintaining the security of the state, the safety of the country or the safety of the people (this is sufficiently broad to include interception of or access to data, as deemed necessary).

Section 44 of the Interim Constitution and Order 3/2558 of the National Council for Peace and Order

Governmental access can also be authorised pursuant to broad authorities existing under Order 3/2558 of the National Council for Peace and Order ("NCPO"), as well as under Section 44 of the Interim Constitution.

Non-compliance under any of the foregoing can result in fines, imprisonment and/or seizure of equipment, depending on the violation.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Telecommunications licensees are not under a general requirement to maintain or enable interception capability. Nevertheless, regulatory framework would accommodate the imposition of such technical requirements, if such a policy decision were made. Moreover, current law enables officials to order a telecommunications licensee (or any other person) to carry out or to cooperate with interception so ordered. Such order could be issued in respect of any form of communications.

4.4 How does the state intercept communications for a particular individual?

In normal circumstances, with probable cause, the state may apply to the Chief Justice of the Criminal Court for an order permitting interception of communications of any individuals, whether through wiretapping or monitoring of written and/or electronic communications. Such requirements, however, may be circumvented through special procedures under some of the laws described in our response to question 4.2 above, such as the Emergency Decree, NCPO Order 3/2558, or Section 44 of the Interim Constitution.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Encryption can be regulated under multiple laws.

With respect to telecommunications applications, the Radio Communications Act provides for the regulation of activities relating to radio communication in Thailand. The Act prohibits any person from producing, possessing, using, importing, exporting or trading any radio communication equipment, unless such person is granted a licence by the NBTC. It provides authority for the NBTC to issue notifications to exempt particular types of radio communication equipment, or those used in certain activities, in either case, as a class or on an individual basis. To the extent any item constitutes radio communication equipment, if encryption capabilities exist in such devices, they would be subject to regulation as part of the device. To date, we are unaware of any denial of approval of a device on the basis of encryption functionality.

With respect to military applications, the Armaments Control Act B.E. 2530 (as amended), provides for regulation of the importation, bringing in, manufacturing, and/or possession of any armament. It provides that no person shall import, bring in, manufacture, or possess armaments, except where a licence has been obtained from the Secretary of Defence,

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or where an exemption is applicable. The definition of armaments can be construed quite broadly, and even includes several routine items that happen to have military applications (dual-use). As such, to the extent that encryption technology, or equipment or software which includes encryption technology is considered an "armament", a licence would be required to import it or otherwise bring it in to Thailand. We are, however, not aware of this law ever being used to deny the importing/bringing in or possession of routine equipment or software used for computer networking and/or telecommunications applications.

Also, the Computer Crimes Act authorises officials of the MDES to access computer systems to decrypt encrypted computer data, order concerned persons to decrypt such data, and order concerned persons to cooperate with a competent official in decrypting such data for the purposes of investigating an offence relevant to the Computer Crimes Act.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Pursuant to regulations issued under the Telecommunications Business Act, telecommunications licensees must retain certain personal data of telecommunications users, including the facts and details concerning each service user by which the service user can be identified, service usage data, telecommunications numbers, and descriptions of individual usage. Licensees must keep personal data of their service users for the last three months (counted from the day following the current day), and in the event that the service is terminated, retain such data for three months following the date of termination of the service. In the case of necessity, the service provider may be required to retain the data for longer than three months after termination of service, but not for longer than two years.

The Regulations issued under the Computer Crimes Act also contain similar obligations that are applicable to service providers (as defined in that Act). Service providers include telecommunications licensees and some operators that are not telecommunications licensees. The Act requires that service providers retain necessary information on each service user, as well as specified computer traffic data; the type of computer traffic data varies by type of provider and/or service. The required computer traffic data must be stored for at least 90 days from the date the data is entered into the computer system, unless extended by a competent official. A competent official may extend this beyond 90 days, but for no more than two years, in particular cases. In addition, service providers must keep user identification data so that the service user can be identified from the beginning of use of the service, and the service provider must keep this data for at least 90 days after termination of the service.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Distribution of television is handled pursuant to the Broadcasting Business Act, with the NBTC as the primary regulator. Other forms of audio-visual media, such as DVDs and computer games, are outside the scope of that Act, but other laws are relevant to them. Notably, the Film and Video Act provides regulatory framework for cinema and DVDs.

The NBTC has been particularly active in exercising its authority with respect to content and competition issues. In multiple cases, the NBTC has fined operators for the broadcast of what was regarded as inappropriate content. It has also intervened in the market to provide for free broadcast of certain sporting events, to address competition concerns.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

The Broadcasting Business Act provides for regulation of the content of television programmes that are broadcast. Content requirements (including advertising) vary between terrestrial broadcasting and non-frequency broadcasting (e.g., cable or IPTV), as well as between different categories of channels.

In addition, the Film and Video Act provides for content controls in respect of movies, commercials, television programmes, videos, certain videogames, karaoke, and other similar content. A committee constituted under that Act has the authority to censor such content, requiring changes before their release.

For some years, OTT services accessible via the public internet have generally operated without regulation, given that most of the providers are abroad and given enforcement challenges in respect of foreign entities. However, there have been recent moves to bring these operators into the regulatory framework, either by asserting that they operate within the regulated space, or on the basis of a new regulatory regime specific to them. Further developments are expected very soon.

It should also be noted that there have been instances of blocking websites and/or parts of websites. The Computer Crimes Act, as well as the Emergency Decree, NCPO Order 3/2558, and the Interim Constitution each provide mechanisms for such blocking.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The Broadcasting Business Act and regulations promulgated thereunder establish framework for: (i) broadcasting network licences; (ii) broadcasting service licences; (iii) broadcasting facilities licences; and (iv) broadcasting application service licences.

Broadcasting service licences are issued for broadcasts using frequencies (e.g., free-to-air) and not using frequencies (e.g., cable). For broadcasts using frequencies, there are multiple categories of licences for public and community broadcasting, but these are available only to government entities and certain associations, foundations, charities and educational institutions. With respect to commercial services, these can be licensed at the national, regional, or local levels. Non-frequency broadcasting services are licensed separately. With respect to frequency and non-frequency commercial broadcasting licences, foreign ownership in the licensee is limited to 25%.

Other regulatory requirements deal with the directorship of companies holding the licences (i.e., that at least 75% of the directors be Thai nationals). Analogous ownership and control restrictions apply to licensees that exist as partnerships. Broadcasting licensees are subject to several other regulatory requirements, some of which exist in law and regulations, and others that are imposed through licence conditions.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licenses are not transferable. However, a licensee may allocate time slots for programming of others, subject to further regulatory requirements.

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A licensee must maintain conformity with its licence conditions in order for the licence to remain valid. In this regard, a change in control could result in breach of said conditions (e.g., if the foreign shareholding ratio was breached). Generally, a licensee must notify the NBTC in writing of a change of control, and the NBTC may instruct the licensee to take particular actions as the NBTC deems appropriate.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

According to the Computer Crimes Act, any service provider that cooperates, agrees, or conspires in relation to a specified offence involving a computer system under its control is subject to the same penalty as that imposed upon the person committing the offence, provided that where the service provider has complied with the regulatory notification setting out the 'mere conduit' defence, the service provider shall not be subject to penalty. The regulatory notification setting out the 'mere conduit' defence is very new, and it is likely that strict compliance therewith would be necessary, in order for a service provider to avail itself of the defence.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

The Copyright Act B.E. 2537 (as amended) addresses the obligations of internet service providers in relation to infringing content and it provides a mechanism by which one can petition the court to request that infringing content be taken down.

Also, pursuant to the Computer Crimes Act, service providers could be held liable in respect of illegal content on their networks, unless they have acted in conformity with the 'mere conduit' regulation. Among the requirements of that regulation, a service provider must have a mechanism for receiving complaints/take-down notices, and for acting on them. The Computer Crimes Act also provides a mechanism by which service providers can be ordered to block/remove illegal content.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Regulations provide that licensees are under general obligations to operate their telecommunications network services and provide services to service users and interconnection users on a non-discriminatory basis. However, they do not go so far as to explicitly require net neutrality.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Pursuant to the Computer Crimes Act, following the issuance of a court order, a competent official under the Computer Crimes Act may block particular websites or other content, or order ISPs to do so. Blocking of websites or content is also possible under the Emergency Decree, NCPO Order 3/2558 and the Interim Constitution. As for VPN services, the provider thereof would be regulated as a service provider under the Computer Crimes Act which, as noted above, requires the retention of specified user data. Access to VPN services has been blocked on occasion, but they are generally available.

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United Kingdom

Arnold & Porter Kaye Scholer LLP

Rob Bratby

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The UK has open and competitive telecoms, internet and broadcasting markets. Ofcom's '2017 Communications Market Report' reported a total UK communications revenue of £54.9bn in 2016, of which £35.6bn was attributable to telecoms (including internet) and £13.8bn to TV with the balance accounted for by radio and post. With over 80% of UK households purchasing at least two communications services together, participants in the UK market are increasing offering bundled services.

Key participants in the UK market include:

- the ex-incumbent **BT plc** which in addition to its position in the fixed and broadband markets competes in the mobile market through its mobile subsidiary **EE** and has entered the pay-TV market;
- national cable TV infrastructure operator **Virgin Media,** which offers mobile telephony through an MVNO in addition to bundled cable TV, broadband and fixed telephony services;
- satellite broadcaster **Sky,** which now also provides broadband, fixed and mobile services;
- 'infrastructure-light' bundled service provider **Talk Talk**;
- 'mainly mobile' (but with bundled offers) **Vodafone**, **O2** and **Three** mobile infrastructure operators;
- the licence-fee funded **BBC** which competes with state-owned but ad-funded **Channel 4** and privately-owned **ITV** and **Channel 5** as public service broadcasters as well as a wider variety of other broadcast channels; and
- over-the-top providers of both content (such as **Netflix** and **Amazon Prime**) and services (such as **Whatsapp**) as well as internet companies including **Google**, **Apple** and **Facebook**.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms and internet

- Communications Act 2003 ("CA 2003").
- Wireless Telegraphy Act 2006.
- Digital Economy Act 2017 ("DEA 2017").
- Regulation of Investigatory Powers Act 2000 ("RIPA").
- Investigatory Powers Act 2016 ("IPA").
- Telecommunications (Lawful Business Practices (Interception of Communications)) Regulations 2000.
- Data Protection Act 1998.
- Privacy and Electronic Communications (EC Directive) Regulations 2003.
- Radio Equipment and Telecommunications Terminal Equipment Regulations 2000.

(b) Audio-visual media distribution

- Broadcasting Act 1990.
- Broadcasting Act 1996.
- Communications Act 2003.
- Wireless Telegraphy Act 2006.
- Digital Economy Act 2010.
- Digital Economy Act 2017.
- The Audiovisual Media Services Directive 2010/13/EU.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

(a) Telecoms and internet

- The UK Government Department for Culture, Media and Sport.
- The Office of Communications ("Ofcom").
- The Competition and Markets Authority ("CMA").
- The Competition Appeal Tribunal ("CAT").
- Phone-paid Services Authority.
- The Information Commissioner.
- Nominet.

(b) Audio-visual media distribution

- The UK Government Department for Culture, Media and Sport.
- Ofcom.
- The Advertising Standards Authority (self-regulatory body for advertising).

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1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

(a) Telecoms and internet

(i) Yes.

(ii) Yes.

(b) Audio-visual media distribution

(i) Yes.

(ii) Yes.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

The UK has been a WTO member since 1 January 1995. It made commitments under the GATS/GATT in relation to the telecommunications market and has adopted the WTO basic telecommunications agreement. The UK has also adopted and implemented the telecoms reference paper, which it jointly sponsored alongside the US in the Uruguay round of WTO negotiations.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of electronic communications networks and services and the use of radio spectrum are regulated by Ofcom.

In particular, Ofcom is responsible for:

- setting and enforcing the General Conditions;
- undertaking market reviews, setting and enforcing SMP conditions (e.g. access and interconnection);
- setting universal service obligations in accordance with the Secretary of State's specification of services;
- setting consumer protection requirements and dealing with complaints;
- managing numbering;
- issuing and enforcing spectrum licences;
- regulating conditional access and electronic programme guides; and
- resolving disputes.

The day-to-day obligations imposed on electronic communications network and service providers ("Communications Providers") are set out in the General Conditions of Entitlement ("General Conditions"). Additional obligations apply to operators with significant market power ("SMP"), and designated universal service providers.

Ofcom also has concurrent jurisdiction with the CMA to enforce competition law in respect of electronic communications matters.

The Phone-paid Services Authority regulates the content and marketing of premium rate services, including directory enquiry services.

The Information Commissioner is responsible for data protection and freedom of information matters.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

Ofcom is the UK's national regulatory authority for communications, and regulates telecom, the use of radio spectrum, the TV and radio sectors and post. Ofcom is independent from the government.

The CMA is the UK's consumer and competition authority (though Ofcom also has concurrent powers to apply and enforce competition law in the telecoms sector). The CMA is a non-ministerial government department independent from government.

Rules are in place to co-ordinate the regulators' exercise of concurrent competition law jurisdiction under the Competition Act 1998 and the Competition Act 1998 (Concurrency Regulations) 2014. These rules are primarily designed to ensure that only one competent authority may launch a formal Competition Act investigation into the same conduct. Further, information on the operation of concurrency procedures is provided in the CMA's first Annual Report on Concurrency, published in April 2015.

Agreements or conduct relating to the sector covered by a concurrent regulator will generally be dealt with by that regulator.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Yes, Ofcom's decisions can be appealed.

Non-price control matters are appealed to the CAT, and price control matters to the CMA.

The Digital Economy Act 2017 introduced a significant change in the standard of review on appeal. From 31 July 2017, the standard of review has changed from an appeal "*on the merits*" to one that applies a judicial review standard by reference to the grounds of appeal. This change is expected to make it significantly harder to appeal Ofcom's decisions.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

No licence or other authorisation is required to install or operate electronic communications networks or services unless the use of radio frequency spectrum is involved or the communications requires powers to access public or private land is required.

In order to use radio frequency spectrum, a Communications Provider must have a licence under the WTA, although Ofcom also has the power to authorise spectrum use on a class licence or a licence-exempt basis.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Ofcom is currently undertaking a significant review of the General Conditions, which is likely to result in significant change. However, at the time of writing, the table below (sourced from Ofcom) summarises the existing provisions:

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Condition	*All providers of ECNs and ECSs*	*Providers of public ECNs and ECSs*	*Providers of publicly available telephone services or PTNs*
1. General access and Interconnection obligations	Paras 1.2 and 1.3 only	Yes (network providers)	Yes (network providers)
2. Standardisation and specified interfaces	Yes	Yes	Yes
3. Proper and effective functioning of the network			Yes (but excludes mobile networks)
4. Emergency call numbers			Yes
5. Emergency planning			Yes
6. Public pay telephones	#	#	#
7. Must carry obligations	*	*	*
8. Operator assistance, directories and directory enquiries			Yes
9. Requirement to offer contracts with minimum terms		Yes	Yes
10. Transparency and publication of information			Yes
11. Metering and billing		Paras 11.1 and 11.2 only	Yes (subject in part to turnover threshold)
12. Itemised bills			Yes
13. Non-payment of bills			Yes (but excludes mobile services)
14. Codes of practice and dispute resolution		Yes	Yes
15. Special measures for end users with disabilities			Yes
16. Provision of additional facilities			Yes
17. Allocation, adoption and use of telephone numbers	Yes	Yes	Yes
18. Number portability	Yes	Yes	Yes
19. Provision of directory information	Yes	Yes	Yes
20. Non geographic numbers	Yes	Yes	Yes
21. Quality of service		Yes	Yes
22. Service Migrations and Home-moves		Yes (fixed and broadband)	Yes
23. Sales and Marketing of Mobile Telephony Services		Yes (mobile)	Yes (mobile)

Providers of public pay telephones

* Providers of "Appropriate networks" used for receiving TV

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

For many, activities licences are not required, so the question does not arise.

Whilst there are no hard and fast rules concerning the duration of spectrum licences, typically they are granted for an initial fixed period, with an option to renew on payment of additional licence fees. Where applicable regulations have been passed, the licences may be traded or transferred.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The DEA 2017 significantly updated and improved the UK's regime enabling access to land. However, the new provisions have not yet been brought into force, and so the existing regime, found in a schedule to the CA 2003 remains in force. Both the new and the old scheme enables providers of electronic communications networks to construct infrastructure on public land (streets), and to take rights over private land, either with the agreement of the land owner or by applying to court.

In addition, there are also certain exceptions to planning legislation available to Communications Providers. For example, under planning regulations (e.g. The Town & Country Planning (General Permitted Development) Order 1995, as amended), land may be developed by Communications Providers to whom the Code applies for the purposes of their networks, in particular the installation, alteration or replacement of apparatus.

Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

General Condition 1 requires all Communications Providers to negotiate interconnection on request.

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Various SMP conditions also require various UK Communications Providers (most notably BT and, for call termination, mobile operators) to provide various interconnection and/or access services and to publish the reference terms and conditions.

Disputes between different Communications Providers concerning network access and the relevant terms and conditions for such access may be referred to Ofcom for resolution. Ofcom must, other than in exceptional circumstances, make a binding determination resolving the dispute within four months of the date of its decision to handle the dispute, although this timescale is often missed in practice.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Following market reviews, publication obligations have been imposed on Communications Providers including BT for various products, and on Everything Everywhere, T-Mobile and Vodafone for voice call termination.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Interconnection and network access is subject to price regulation in a number of different markets, in particular, fixed narrowband, retail leased lines, symmetric broadband origination and trunk segments, wholesale local access and wholesale mobile voice call termination.

In general, where wholesale pricing obligations have been imposed, prices are required to be based on forward-looking long-run incremental costs plus a mark-up for common costs including return on capital employed. In certain markets RPI-X price caps have been imposed. A pure LRIC basis is used for setting mobile termination rates.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

(a) Both BT and KCom are subject to accounting separation requirements pursuant to their SMP obligations on certain markets, including cost accounting rules and accounting separation obligations.

(b) In 2005, BT gave Undertakings to Ofcom in order to avoid a reference to the former Competition Commission under the Enterprise Act 2002. Among these obligations was an Undertaking to set up Openreach as a functionally separate business unit of BT to operate BT's local access network.

(c) Following a review by Ofcom, in 2017 BT offered new Undertakings to Ofcom which will replace the 2005 Undertakings when implemented. These include establishing Openreach Limited as a wholly-owned, but legally separate, subsidiary of BT plc, with independent responsibility for the strategy, management and operation of Openreach and the employment of 32,000 employees; Openreach to have a majority independent board; and Openreach having with duties to treat all customers equally. The Undertakings also require Openreach control over assets and customer data confidentiality walls.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

BT is the only operator with regulatory obligations to provide access to its high-speed broadband networks, and there are no access obligations imposed on the national cable TV operator Virgin Media, or other fibre network infrastructure operators.

BT is obliged to provide access to its passive infrastructure, copper networks and a 'virtual unbundled local access' product on its next generation network.

Some (but not all) of BT's high-speed access products are subject to price regulation.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Mobile operators are subject to the EU-level Mobile Roaming Regulation (Regulation 531/2012), which imposes caps on wholesale and retail charges for mobile calls, SMS and data services while roaming between EU Member States.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The General Conditions include a number of consumer protection obligations and requirements which apply over and above general consumer protection law.

In addition, there are a small number of Universal Service obligations on BT.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identifying codes are allocated and managed by Ofcom.

2.17 Are there any special rules which govern the use of telephone numbers?

Communications Providers are required by General Condition 17 (Allocation, Adoption and Use of Telephone Numbers) to comply with the National Telephone Numbering Plan. Numbers are allocated for specific uses e.g. geographic, mobile, etc., and may be granted for a limited period of time.

In addition, the services offered behind particular number ranges may be subject to regulation by the Phone-paid Services Authority, for example, premium rate or 09 numbers, 08 and directory enquiry services and premium rate SMS.

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Communications Providers are required to unbundle charges for calls made to non-geographic numbers, such as 0845 or 03 numbers.

2.18 Are there any obligations requiring number portability?

All Communications Providers are required by General Condition 18 (Number Portability) to facilitate the porting of numbers, including mobile numbers. This means that numbers must be ported on a customer's request, subject to a reasonableness requirement, and Communications Providers must enter into porting arrangements when requested by another operator. Porting must take place within one business day. The cross-industry porting procedure has been defined in detail.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Ofcom regulates spectrum use.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Spectrum use may be authorised on the basis of individual licences, class licences or licence-exempt use. In general, Ofcom will use auctions to allocate scarce spectrum.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Yes, pursuant to the Wireless Telegraphy (Exemption) Regulations 2003, as amended.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

For commercially exploitable wireless telegraphy licences, fees will normally be payable, either pursuant to prices bid at auction or under administrative incentive pricing ("AIP") set under specific regulations according to the type of service involved. AIP seeks to set fees to mimic the market value of the spectrum.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

If the legal entity that has the benefit of the spectrum licence does not change, the change of control would not usually result in a change to the spectrum licence. However, in a certain spectrum (notably that used for mobile services) a competition assessment may be triggered.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Yes. The regime for controlling the trading and leasing of spectrum licences is set out in the WTA and the Wireless Telegraphy (Spectrum Trading) Regulations 2012 ("Trading Regulations") which, from 13 September 2012, replaced and revoked the earlier trading regulations. Ofcom's consent is no longer needed for most spectrum trades.

The Trading Regulations allow spectrum licence holders in certain classes to transfer all of their licence rights and obligations.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

The Network and Information Security Directive 2016/1148 is due to be implemented in all member states of the European Union by 10 May 2018, including the UK, although it is not clear how this will be impacted by Brexit.

The Computer Misuse Act 1990 specifies various hacking offences and the Official Secrets Act 1989 deals with national security.

Each of the Communications Act 2003, the Data Protection Act 1998, Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) contain obligations on Communications Providers (and others) to take appropriate technical and organisational security measures.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

RIPA and the IPA govern interception of the content of communications and acquisition of data associated with that communication. Both RIPA and the IPA set out the requirements and process for access to private communications by the state and provide an oversight mechanism.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

The Government can require a Communications Provider to maintain intercept capacity by issuing a specified notice, preceded by consultation.

RIPA sections 12-14 and The Regulation of Investigatory Powers (Maintenance of Interception Capability) Order 2002 set out the framework. Traditional telephone calls, VoIP calls, emails and other forms of electronic communication are all within the scope of intercept capability.

4.4 How does the state intercept communications for a particular individual?

Under both RIPA and IPA, a warrant is required to intercept communications.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Under RIPA, the Government has the power to serve a notice: to require disclosure of protected information in an intelligible form; to require disclosure of the means to access protected information; and to

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require disclosure of the means of putting protected information into an intelligible form.

Notice to disclose encryption keys may only be served where necessary for: national security; preventing or detecting serious crime; safeguarding the economic wellbeing of the UK; or "effective exercise or proper performance" by a public authority of statutory powers or duties.

Necessity and proportionality tests must be met.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Under the IPA, operators may be required to retain communications data which may be used to identify, or assist in identifying, any of the following:

(a) the sender or recipient of a communication (whether or not a person);

(b) the time or duration of a communication;

(c) the type, method or pattern, or fact, of communication;

(d) the telecommunication system (or any part of it) from, to or through which, or by means of which, a communication is or may be transmitted; or

(e) the location of any such system, and this expression, therefore, includes, in particular, internet connection records.

They may be required to retain data for a maximum of 12 months.

The law relating to data retention is contentious and subject to ongoing challenges, notably at the ECJ.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Broadcasters of linear and non-linear content are regulated differently (see question 5.2 below). The provision of the infrastructure over which content is delivered is regulated under the telecommunications regulation regime described above.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

- Linear content, whether delivered over the internet or via traditional distribution platforms, is regulated under a licensing regime administered by Ofcom.
- All UK linear TV channels require a licence (see question 5.3 below).
- Since 2009, pursuant to the AVMS Directive, UK-based non-linear services have been subject to a set of minimum standards overseen by Ofcom in respect of editorial and administrative regulation. Ofcom has designated the Advertising Standards Authority as the co-regulator for advertising content on non-linear services.
- Non-linear services do not require a licence, but there is a compulsory pre-notification requirement to Ofcom before making such 'on demand' services available.
- There is an additional layer of obligations (and benefits) applying to the public service broadcasters ("PSBs") in the UK, which include BBC, ITV, Channel 4, Channel 5 and S4C. The PSBs are under an obligation to make their core channels available to major platforms, however, this does not apply to on-demand services. In addition, there are "Must Carry" obligations on platforms to carry PSB linear channels, which do not apply to on-demand content.
- Broadcasters of linear content are subject to the Broadcasting Committee on Advertising Practice (BCAP) Code, whereas non-linear content falls under the remit of the General Committee on Advertising Practice (CAP) Code. As a result, non-linear content providers are not subject to certain rules, such as those regarding the watershed.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The BBC operates pursuant to a *sui generis* Royal Charter.

Aside from the BBC, the key licence types are as follows:

- DRL – licence in force for public service broadcasters as successor to analogue broadcast licence.
- DPSL – digital programme service licence; for services distributed via UK digital terrestrial television.
- TLCS licence – for linear services distributed via other platforms for reception by members of the public.

DRL licences contain certain public service obligations regarding the types of programming to be broadcast, but beyond these, all licence types contain broadly similar obligations to comply with:

- Ofcom programming standards (including standards of taste and decency, protection of minors and editorial integrity);
- advertising standards (including truth and accuracy in advertising, control over the timing and scheduling of advertisements); and
- minimum requirements for European content and content from independent producers.

For PSB licences, there are limits on the rights which may be acquired under a commissioning arrangement with an independent producer.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences are assignable with the prior approval of Ofcom and are subject to the payment of a small fee to Ofcom (currently £1,000). Other than in respect of the public service broadcasting licences, Ofcom will only decline to approve a licence assignment where the assignee would have been ineligible to apply for the licence in the first place or is not a "fit and proper" person to hold a licence.

There are no restrictions on change of control in Ofcom licences, although any company that acquires control of an Ofcom licensee is required to be a "fit and proper" person and to not be from the category of entities ineligible to hold an Ofcom licence (political and religious bodies, local government authorities and advertising agents and those "connected" with them, as well as those convicted of certain "pirate broadcaster" offences). Notification must be given to Ofcom within 30 days after any change of control takes place.

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6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Under the Electronic Commerce Regulations 2002, provided that a service provider that acts as an ISP, network operator or web host complies with the Regulations, it will generally not be liable for any material where it:

- acts as a mere conduit;
- caches the material; or
- hosts the material.

Where a service consists of either transmitting in a communication network of information which has been provided by a recipient of the service (e.g. an ISP transmitting a customer's email) or where the service consists of the providing access to a particular communication network (for example, an ISP) then the service provider will not be liable for damages, any other financial remedy or any criminal sanction if:

- it did not initiate the transmission;
- it did not select the receiver of the transmission; and
- it did not select or modify the information in the transmission.

There is no general obligation on service providers to monitor content, but once a service provider gains 'actual knowledge' of any unlawful material or the removal from its original source of any cached material, it must act 'expeditiously' to ensure that such material is taken down. This has been construed relatively restrictively, meaning that if a service provider has taken on any editorial role, it cannot rely on this defence.

Section 1 of the Defamation Act 1996 also provides for a defence for a service provider which has published a defamatory statement where it: (a) is not the author, editor or publisher of the material; (b) takes reasonable care in relation to the publication; and (c) does not know or has no reason to believe that which it did caused or contributed to the publication of a defamatory statement. The leading case of *Godfrey v Demon Internet* established that it is not necessary for an ISP to remove defamatory material instantly on notification, but that this must be done within a reasonable time (in this case a delay of 10 days defeated the defence).

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Under the Digital Economy Act 2010, large ISPs are required to collaborate with content owners in a process where infringers are notified and warned of their conduct. In addition, ISPs must provide a list of infringers to the relevant content provider.

However, whilst this legislation is in force, it is not yet known when or if the sections relating to online piracy will be implemented in their current form. The industry-led scheme Creative Content UK, has launched some voluntary equivalents to these provisions of the Digital Economy Act 2010, including sending educational alerts to those who infringe content online.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Subject to general competition law, Communication Providers are able to differentially charge. However, Communications Providers with SMP (including BT) may be subject to undue discrimination rules.

The Connected Continent Regulation (EU) 2015/2120 sets out high-level rules in relation to net neutrality and BEREC has issued guidelines on its application.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

There are no general obligations to block access.

However, UK copyright law contains a process, under section 97A of the Copyright, Designs and Patents Act 1988, under which content owners have successfully sought injunctions against specific ISPs in connection with sites which are known to be consistent infringers of IP. Such orders have to date been made requiring most of the major ISPs to block content from e.g. Pirate Bay, Newzbin and a number of other services which offer peer-to-peer or live streaming services.

The Internet Watch Foundation is a voluntary organisation which helps operators and ISPs identify and block access to certain illegal content.

Whilst there is no regulation of consumer VPN services in the UK, streaming services based in the UK have started to introduce measures to prevent users from using VPN to bypass geoblocking.

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Chapter 31

USA

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

The U.S. telecommunications market generates a total revenue of over $500 billion. Traditional wireline telephone service is offered by the incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). AT&T and Verizon are two of the largest providers of telecoms in the United States, offering a full array of services including traditional voice and data, wireless, broadband and internet access, and multichannel video programming. An FCC report with statistical data on U.S. voice telephone service is available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-342357A1.pdf.

The deployment of "advanced telecommunications capability" to all Americans in a reasonable and timely fashion is a policy goal of the United States. Advanced telecommunications capability is the availability of high-speed, switched, broadband telecommunications that enables users to originate and receive high-quality voice, data, graphics, and video using any technology. Key providers of internet access service in the U.S. are the traditional telecommunications companies and cable providers. The total number of internet connections in the United States increased by about 8% between June 2015 and June 2016 to 369 million. The median downstream speed of fixed connections reported to the FCC was 28 Mbps, and the median upstream speed was 5 Mbps. A Federal Communications Commission ("FCC") report summarising this information and providing additional data on connections and speeds for internet access services in the United States is available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf. U.S. law is evolving with respect to the regulation of the internet sector. Currently, it is subject to less regulation than the telecoms, wireless, and audio-visual industries, and there are no restrictions on foreign ownership. However, there are several rulemaking proceedings and court cases considering the application of additional regulatory requirements to broadband internet access service providers.

U.S. providers of mobile wireless services offer an array of mobile voice and data offerings, including interconnected voice services, text and multimedia messaging, and broadband internet access services. The four largest facilities-based mobile wireless service providers in the United States are AT&T, Verizon Wireless, T-Mobile US, and Sprint. The U.S. market also includes multiple local or regional providers such as U.S. Cellular, C Spire, and nTelos. The U.S. wireless communications marketplace also includes resellers and mobile virtual network operators ("MVNOs"), such as TracFone, which purchases mobile wireless services wholesale from facilities-based providers and resells them to consumers. According to the FCC's annual wireless competition report, total wireless service revenue in 2015 was $191.9 billion, with the four nationwide service providers accounting for approximately 98%. The most recent report is available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1061A1_Rcd.pdf.

The audio-visual market is comprised of multichannel video programming distributors ("MVPDs"), broadcast television stations, and online video distributors ("OVDs"). MVPD service is provided by many regional and local cable providers, with Comcast, Charter, and Cox as key companies. AT&T-DIRECTV and DISH are MVPDs that provide satellite-delivered service, called Direct Broadcast Satellite or Direct-to-Home. Total MVPD video revenue increased from $112.7 billion in 2014 to $115.6 billion in 2015. The OVD market, which includes Netflix, Apple and Google, is growing as internet-delivered technology develops and consumers prefer to time-shift their audio-visual consumption. Over-the-air broadcasters are benefiting from digital broadcasting technology and offered improved service to 12.4 million households in 2015. There is a broad distribution of broadcast programming by MVPDs as well. MVPDs must obtain regulatory authority before providing video services and comply with several operational rules, such as must-carry, retransmission consent, and various other obligations depending on whether the entity is a cable MVPD or a non-cable MVPD. The FCC produces an annual report on competition in the audio-visual market, available at https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1.pdf.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most comprehensive legislation related to telecoms and audio-visual media distribution in the United States is the Communications Act of 1934, as amended (the "Communications Act"). It is codified at Title 47 of the U.S. Code. The Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996), was the first major overhaul of U.S. communications law in almost 62 years. Other communications industry laws adopted by the U.S. Congress include the Cable Act of 1992 and the Open-Market Reorganization for the Betterment of International Telecommunications Act ("the ORBIT Act").

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1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Federal Communications Commission ("FCC") is the U.S. regulatory agency with primary jurisdiction over the communications industry. It is an independent agency within the Executive branch. The FCC is led by five commissioners who are appointed by the President of the United States and confirmed by the U.S. Senate. The U.S. President also selects one of the commissioners, typically from the majority political party, to serve as Chairman. Only three commissioners can be of the same political party at any given time and none can have a financial interest in any Commission-related business. All commissioners, including the Chairman, have five-year terms, except when filling an unexpired term.

Local and state-level regulation of telecommunications and cable companies is handled by local public utility commissions ("PUCs"). PUCs typically regulate intrastate communications, with interstate and international communications falling under the purview of the FCC.

The National Telecommunications and Information Administration ("NTIA") regulates the use of spectrum by the United States government. NTIA is an executive agency within the U.S. Department of Commerce ("DOC").

The Federal Trade Commission ("FTC") is the U.S. regulatory agency that implements federal consumer protection laws that apply to telecoms, media, and internet companies. The FTC, together with the FCC and U.S. Department of Justice ("DOJ"), implements antitrust laws and has oversight of mergers and acquisitions involving U.S. communications companies.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

The telecommunications industry in the United States is liberalised and open to competition and foreign investment.

Section 310 of the Communications Act sets forth foreign ownership restrictions on U.S. radio licences. Under Section 310(a), U.S. radio licences may not be held by a foreign government or its representative. Section 310(b) contains foreign ownership restrictions on U.S. broadcast, common carrier, and aeronautical radio station licensees that require the FCC to make an affirmative public interest finding to allow foreign ownership in excess of 25%. In addition, common carrier applications from companies with reportable foreign ownership or a transfer of control or assignment application in which foreign ownership is an issue is reviewed by the Executive branch, including DOJ, the U.S. Federal Bureau of Investigation ("FBI"), and the U.S. Department of Homeland Security ("DHS"), for potential national security, law enforcement, and public safety issues. The U.S. Department of the Treasury's Committee on Foreign Investment in the United States ("CFIUS") also reviews national security implications of foreign acquisitions of U.S. companies, under the authority of the Exon-Florio Amendment to the Defense Production Act of 1950.

The cable market has been liberalised without any significant barriers to entry; however, a local franchise is required, and competition is minimal except for OVDs. There are no federal restrictions on foreign ownership of cable systems. In addition, the FCC recently decided to liberalise its waiver policy on permitting more than 25% foreign ownership in broadcast television and radio companies.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

The United States is a member of the World Trade Organisation and was one of the original signatories to the Fourth Protocol of the General Agreement on Trade in Services ("GATS"), commonly known as the Basic Telecommunications Agreement. The U.S. has also signed on to the telecoms reference paper. Through these treaty obligations, the United States applies the principles of "most favoured nation" and "national treatment" to the communications industry. The pro-competitive commitments of the reference paper were implemented by the FCC in 1997 through two rulemaking proceedings: (1) Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd 23891 (1997); and (2) Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 12 FCC Rcd 24094 (1997).

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Communications services are regulated differently based on the nature of the technology used to provide the service and its classification under federal statute. Fixed, wireline communications are classified as "common carrier" services under the Communications Act of 1934 and, therefore, are highly regulated at both the federal and state level. Radio, television, satellite, and cable services are each regulated by a separate set of rules. Broadband internet access service, previously regulated as an "information" service, is now also classified as a common carrier service following the FCC's decision in the 2015 Open Internet Order. However, following the change in administration, in May 2017 the FCC launched a proceeding to review this classification, reinstate information service classification, and "return the U.S. to the bipartisan, light-touch regulatory framework under which a free and open Internet flourished for almost 20 years". This proceeding, which is still ongoing, has generated intense interest in the U.S. and elsewhere, and whatever rules the FCC ultimately adopts will likely be subject to challenge.

Although federal law provides the FCC with jurisdiction over interstate and international telecommunications, state regulatory authorities have jurisdiction over intrastate telecommunications. This dual system of federal and state telecommunications regulations is designed to foster a cohesive nationwide system while respecting state authority over local matters.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The FCC, an independent U.S. government agency overseen by Congress, is the primary authority for communications laws, regulation, and technology innovation. It has jurisdiction over

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interstate and international communications. The DOJ and FTC have overlapping jurisdiction in matters including antitrust, competition, and consumer protection. Particularly in large mergers and acquisitions of telecom carriers, one of these two entities will conduct its own parallel review under U.S. antitrust law to determine whether the proposed transaction would substantially lessen competition. State telecom regulators, in addition to governing intrastate communications, have increasingly become more involved in merger reviews as well.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

The Administrative Procedure Act sets forth procedures for agency rulemaking and adjudication, as well as provides recourse for aggrieved parties seeking review. Final decisions made by an office or bureau of the FCC may be appealed to the full Commission for reconsideration. Final FCC decisions may thereafter be appealed to a federal court. The U.S. Courts of Appeals have exclusive jurisdiction to review final orders and decisions of the FCC. Because the Commission is considered an expert in the field and, therefore, entitled to some deference, the courts will generally consider whether the agency has the statutory authority for its decision, whether the decision is arbitrary and capricious (reasonableness standard), and whether the decision violates the U.S. Constitution.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Telecommunications service providers in the United States may receive regulatory authorisations at both the federal and state level. The type of authorisation sought and obtained by telecommunications service providers depends on the type of telecommunications service offered.

At the federal level, common carriers are generally not required to obtain authorisations before providing interstate domestic services, but common carriers must obtain authorisations from the FCC pursuant to the Communications Act before providing international services. A common carrier offering only domestic services is only required to obtain authorisation from the FCC before discontinuing, reducing, or impairing the telecommunications service. A common carrier that receives an international authorisation must also obtain approval prior to a transfer of control or assignment of the authorisation. (See question 2.7.) At the state level, common carriers must obtain authorisation from state PUCs before providing local and long-distance service.

Radio spectrum is licensed to individuals, commercial entities, and state and local governments by the FCC. The FCC awards most radio spectrum licences to users by conducting spectrum auctions. Users of radio spectrum may operate unlicensed spectrum so long as they comply with certain conditions set by the FCC.

Voice over Internet Protocol ("VoIP") providers are only required to receive a federal authorisation when discontinuing their service. The FCC regulates interconnected VoIP providers like traditional phone services with respect to 911 services, portability, calling records, accessibility, and contributions to the Universal Service Fund. VoIP providers are also regulated at the state level. States with regulations typically require that VoIP providers register with the state PUC.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

There is no general telecommunications authorisation in the United States. Telecommunications services in the United States are authorised by the FCC, pursuant to the Communications Act of 1934, and by state entities, like PUCs. The various FCC and state telecommunications authorisations required depend on the type of telecommunications service provided.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The FCC issues radio spectrum licences to commercial and non-commercial users by frequency range, geographic area, and the type of radio service provided. (See questions 3.1–3.6). These licences may last up to 10 years and may be renewed. The FCC also issues satellite licences for launching and operating space stations and earth stations. These satellite authorisations may last up to 15 years and may be renewed.

FCC approval for transfers of radio spectrum licences vary based on the type of licence. (See question 3.5.) Some wireless licences are immediately approved by the FCC. Transfers for more complicated wireless licences, such as those that are part of a large transaction, can take up to six months or longer. The FCC facilitates a secondary market for spectrum usage rights where spectrum users may enter into different types of spectrum leasing arrangements.

Domestic interstate wireline services are generally authorised by state PUCs and the FCC. The state PUCs' requirements for obtaining authorisations vary. The FCC generally issues a blanket licence for interstate wireline services. International wireline services are authorised by the FCC. To receive an international authorisation, the service provider must obtain a Section 214 licence from the FCC. Section 214 licences do not expire and are transferable upon FCC approval.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Although the installation of telecommunications infrastructure is generally a matter of local concern, the Communications Act limits state and local authority in this area for removing barriers to entry and encouraging the deployment of facilities. Local authorities may not unreasonably discriminate among providers of equivalent services, nor may local authorities act in ways that effectively prohibit telecommunications service. Local authorities are also prohibited from regulating the placement of infrastructure based on the environmental effects of radio frequency emissions. Finally, local authorities must follow federal requirements and timelines when reviewing applications to place wireless infrastructure. With respect to federal lands, Congress has taken action to streamline the process for siting facilities, though implementation remains ongoing.

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Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Common carriers are required by statute to permit interconnection directly or indirectly with the facilities and equipment of other telecommunications carriers. All local exchange carriers must allow resale, support numbering portability and dialing parity, provide access to rights of way, and pay reciprocal compensation. ILECs must provide interconnection, access to unbundled network elements, offer resale at wholesale rates, provide notice of network changes, and permit collocation.

Interconnection and collocation disputes are handled at the state level. Carriers negotiating such agreements may ask the state telecom regulatory agency to participate in the negotiation and mediate any disputes. Should mediation fail, the state commission may step in to arbitrate unresolved issues. Final state PUC decisions are reviewable in an appropriate federal district court. In the event a state PUC fails to act, the FCC may preempt the state's jurisdiction and assume responsibility for the proceeding.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Any interconnection agreement adopted by negotiation or arbitration is subject to approval by the state PUC. These decisions, as well as the underlying interconnection agreement, are made publicly available. Similarly situated carriers thereafter have the right to opt-in to an agreement under the same terms and conditions.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Intercarrier compensation rates vary based on several factors, including: call origination and termination (local or long distance, interstate or intrastate); the carriers involved (ILECs, CLECs, long-distance carriers, wireless carriers); and the traffic type (wireline voice, wireless voice, data). Historically, interstate access charge rates are regulated at the federal level and intrastate access charge rates are regulated at the state level.

As a general matter, ILECs are required to interconnect on rates, terms, and conditions that are just, reasonable, and non-discriminatory. They must also offer unbundled access to network elements at cost-based rates, unless the Commission determines the market at issue is competitive and waives the requirement. The FCC is presently transitioning toward a "bill-and-keep" system for all telecommunications traffic exchanged with LECs where carriers fund the costs of terminating inbound traffic from other carriers through charges to their own end users. Bill-and-keep is also the default methodology for all non-access wireless traffic. Wireless traffic, however, that originates and terminates in the same major trading area (intraMTA) is subject to reciprocal compensation rates – requiring the originating carrier to compensate all carriers that assisted in call completion. Calls exchanged between LECs and other carriers in normal PSTN format, even if they originate in IP format (i.e., VoIP), are also subject to compensation. IP-IP interconnection agreements are formed through private negotiations between carriers.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

ILECS are often subject to additional accounting, functional, or legal separation requirements. For example, the Bell Operating Companies created by the breakup of the Bell Telephone Company monopoly in the early 1980s presently rely on a network of business entities utilising various structural, transactional, and accounting safeguards to provide local, intrastate, and interstate services. Separation rules, as a matter of public policy, are thought to benefit the public interest by promoting competition.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

Providers of high-speed broadband internet access service are currently prohibited from blocking, throttling, and offering paid prioritisation to internet content, and are subject to disclosure requirements about their network management practices. There is a pending proceeding that proposes to reduce the regulations applicable to high-speed broadband providers.

Although rules and regulations governing pole attachments vary by the type of service provider and state locality, the FCC is responsible by statute for ensuring that rates, terms and conditions applicable to pole attachments are just and reasonable. Carriers are also provided certain right-of-way guarantees to facilitate fibre to the home ("FTTH") or fibre to the premises ("FTTP") buildout.

ILECs must provide access to their existing copper loop facilities for voice services. When legacy copper facilities are retired and replaced by fibre, ILECs are similarly required to offer unbundled access to their fibre facilities on a non-discriminatory basis for voice services. However, competitors are not entitled to unbundled access of fibre facilities deployed in unserved areas.

Unlike wireline providers with legacy copper networks, providers with fibre-based networks are not typically required to provide unbundled access to their facilities. Where an ILEC retires its copper facilities and replaces them with fibre, however, the carrier must offer its competitors access for voice (but not broadband) service.

The FCC has adopted several regulations concerning next-generation fibre services. To address the rapid transition from legacy copper to IP-based networks, for example, the FCC has established rules for copper retirement and standards to streamline transitions to an all-IP environment. Fibre networks used to support business data services (i.e., special access) are also highly regulated by the Commission, setting price caps in several markets for business data services.

Cable operators are normally not required to offer unbundled access to their networks.

The FCC continues to support efforts to promote broadband investment and deployment of advanced telecommunications networks nationwide. To help address deployment barriers, the FCC has undertaken several reforms to its existing Universal Service Fund – a system of telecommunications subsidies used to support deployment of voice and broadband services to high-cost areas, low-income customers, rural healthcare providers, and schools and libraries. The Commission also frequently conditions its approval for large telecom mergers on an agreement by the carrier to deploy broadband in unserved and underserved areas.

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Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Telecommunications service providers must charge retail prices that are just and reasonable and cannot unreasonably discriminate among customers. Price controls for mobile services have historically been less stringent because of competitive market conditions. Although internet access service is not subject to price controls at this time, the FCC is open to complaints alleging that prices are unjust or unreasonable.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The provision of telecommunications service is subject to extensive regulation under Title II of the Communications Act and FCC rules. Telecommunications carriers cannot charge retail prices that are unjust and unreasonable, engage in any practice that is unjust or unreasonable, or unreasonably discriminate among customers. Telecommunications carriers must comply with regulations governing the privacy of customer information, truth in billing, unwanted telephone calls, and other regulations applicable to common carriers.

Telecommunications companies must pay a percentage of their interstate and international end-user revenues to the Universal Service Fund ("USF"), which supports programmes facilitating access to communications services by rural area consumers (the Connect America Fund ("CAF")), low-income consumers (the Lifeline Program), and schools and libraries (the E-Rate Program), and support rural health care. The proposed USF contribution factor for Q4 2017 is 18.8%. The FCC adjusts the contribution factor quarterly depending upon the anticipated needs of the USF programmes. Entities required to contribute to the fund include wireline and wireless telecommunications carriers, as well as interconnected VoIP providers.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

The FCC has jurisdiction over telecommunications numbering, but has delegated this responsibility to administrators, which must be impartial entities and make numbers available on an equitable basis. Neustar currently serves as both the North American Numbering Plan administrator, which oversees number allocation, and local number portability administrator, which oversees number portability between carriers. However, the FCC has selected Telcordia Technologies d/b/a iconectiv to assume the role of local number portability administrator beginning in 2018.

2.17 Are there any special rules which govern the use of telephone numbers?

The North American Numbering Plan administrator, currently Neustar, distributes telephone numbers on a neutral basis to telecommunications carriers and interconnected VoIP providers based on the carriers' and providers' needs. Carriers and providers must report semi-annually on their use of numbers, and unused numbers can be reclaimed by the administrator. Toll-free numbers are subject to special rules, such as prohibitions on "warehousing" (or legally reserving a toll-free number without having an actual toll-free subscriber for whom the number is being reserved) and "hoarding" (or acquiring more toll-free numbers than a subscriber intends to use).

2.18 Are there any obligations requiring number portability?

Telecommunications carriers – both wireline and wireless – and interconnected VoIP providers are required to allow customers to port their telephone numbers when they switch to a new carrier or provider. The FCC's rules contain requirements for the process and timelines governing number portability.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

In the United States, radio spectrum is regulated by the FCC and NTIA. The FCC regulates radio spectrum used by states, local governments, private entities, and personal uses. NTIA regulates radio spectrum used by the United States government.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Most new spectrum licences for commercial services are awarded using spectrum auctions. With spectrum auctions, the FCC assigns the right to transmit signals over particular bands of spectrum to the highest bidder under the assumption that the highest bidder will use the spectrum most efficiently and effectively.

To begin the spectrum auction process, the FCC must determine the intended use of the band of spectrum. Thereafter, it sets the rules for using the band, which includes establishing a "band plan" that details the band's block, frequencies, bandwidth, pairing, geographic area type, and number of licences.

Any individual or company may participate in a spectrum auction, so long as the FCC considers the individual or company to be a qualified bidder. To encourage minority, small, and rural businesses to participate in spectrum auctions, the FCC awards bidding credits.

A spectrum auction can be a very lengthy process. Most spectrum auctions consist of several rounds of bidding over the course of many weeks and even many months, as is the case with the Broadcast Incentive Auction, which will repurpose some television bands for wireless broadband use.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Users of spectrum that are designated as "unlicensed" or "licensed-exempt" can operate without an FCC licence. However, to do so, users must use certified radio equipment and comply with the technical requirements. Frequency bands between 9 kHz and 275 GHz are allocated for use. Because the spectrum is not licensed, users of unlicensed spectrum do not have exclusive use of the spectrum. Thus, users of unlicensed spectrum may be subject to interference.

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3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The FCC does not require spectrum users to pay ongoing spectrum use fees, but, as required by Congress, the FCC collects annual regulatory fees. Spectrum users participating in spectrum auctions are required to pay a one-time payment for licences before the licences are awarded.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The FCC generally approves transfers of control of spectrum licences, so long as the licence holder seeks approval prior to the transfer. Many transactions involving wireless terrestrial licences are approved and processed immediately. Those transactions include those that do not require a waiver of the Commission rules and raise no public policy concerns. Other transactions, however, must undergo the FCC's formal approval process, in which the FCC uses a "spectrum screen" to determine whether there is a competitive impact associated with the proposed transaction.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

The FCC supports secondary markets for spectrum use, including spectrum leasing arrangements. Certain spectrum leasing, assignment, and transfer transactions are approved instantaneously, while others are subject to the FCC's formal approval process. (See question 3.5.)

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

In the United States, there is no single, comprehensive federal law mandating specific cybersecurity solutions. Rather, multiple federal and state agencies and industry groups have provided voluntary guidance on cybersecurity practices. This guidance does not have the force of law, but is part of self-regulatory guidelines and frameworks that are considered "best practices." These self-regulatory frameworks, however, can be used as a tool for enforcement by regulators. Most notably, the FTC can bring enforcement actions against companies for unreasonable cybersecurity practices. The FTC's primary legal authority comes from Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive practices in the marketplace. Although the FTC has not provided detailed guidance on what constitutes "reasonable" data security practices, the FTC's "Start with Security: A Guide for Business" outlines 10 practical lessons for data security based on past enforcement actions.

Apart from the FTC, the most prominent voluntary guidance for data security is the Cybersecurity Framework developed by the National Institute of Standards and Technology ("NIST"). NIST's Cybersecurity Framework covers a wide range of security controls, including network design, access control, physical security, encryption, and incident response. NIST's Cybersecurity Framework is designed to be flexible and risk-based, meaning that entities can select which data security practices are appropriate given the size and sophistication of the entity and the cyber threats it faces. The Cybersecurity Framework has been adapted to focus on specific best practices for the communications sector. Specifically, the Communications Security, Reliability, and Interoperability Council ("CSRIC"), which is an advisory committee to the FCC, has worked with the private sector to tailor the NIST Cybersecurity Framework for application to the communications sector. CSRIC's guidance is organised around five communications sector segments – broadcast, cable, wireless, wireline, and satellite – and includes a streamlined set of technical and operational best practices for communications providers.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

At the federal level, a governmental entity may access private communications pursuant to two statutes: the Electronic Communications Privacy Act ("ECPA"); and the Foreign Intelligence Surveillance Act ("FISA"). ECPA is divided into three titles: Title I – The Wiretap Act, which protects the transmission of wire, oral, and electronic communications; Title II – The Stored Communications Act, which protects electronically stored communications; and Title III – the Pen Register Act, which prohibits using pen registers and trap and trace devices to record information obtained during the transmission of wireless or electronic communications. Under FISA, a governmental entity may conduct electronic surveillance and physical searches and seizures of private communications when national security is at issue. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), which was enacted in response to the September 11, 2001 terrorist attacks, amends the ECPA and FISA by providing additional methods for intelligence surveillance.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

ECPA and FISA require that telecommunications service providers that offer wireless and electronic communication services comply with law enforcement agencies' requests to conduct electronic surveillance of private communication. The Communications Assistance for Law Enforcement Act ("CALEA") amended ECPA and FISA to require that telecommunications carriers ensure that the hardware and software used to provide its telecommunications services allow law enforcement agencies to conduct real-time electronic surveillance pursuant to requests to access private information. CALEA requirements apply to traditional telephone calls, and providers of facilities-based broadband internet access and VoIP services must also comply with CALEA requirements because these providers are not considered information services under the Act. On the other hand, email services are classified as information services and, as such, are not required to comply with CALEA requirements. Providers of email services, however, must comply with court orders and subpoenas requesting access to an email service subscriber's email communications.

4.4 How does the state intercept communications for a particular individual?

State law enforcement agencies may intercept an individual's private

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communication after showing probable cause, requesting and receiving a court order pursuant to ECPA or FISA, and subsequently serving that order on a telecommunications provider. The methods by which a state may intercept the private communication varies, but some methods include re-routing communications to a law enforcement controlled server and gaining access to a cellular telephone line. States often limit the period of law enforcement surveillance to 30 days.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Currently, there is no law prohibiting users of telecommunications devices from encrypting information on their devices, nor a law prohibiting a telecommunications service provider from making encryption technology available to its users. However, the encryption of mobile phone and other telecommunications devices continues to be a subject of significant national debate. For example, in 2016, a federal court issued an order pursuant to the All Writs Act of 1789 ("AWA") compelling Apple to write new software that would allow the FBI to unlock an iPhone to gather communications information for a criminal investigation. Prior to the hearing on the government's motion to compel in that case, the FBI, with the assistance of an outside security researcher, obtained a method of bypassing the iPhone's security features without the assistance of Apple, and the issue was mooted. It is likely that law enforcement will seek to use the AWA to compel service providers to decrypt end user data in the future. Whether courts will ultimately side with law enforcement or service providers regarding the scope of the AWA is unclear. Under CALEA, however, telecommunications service providers and manufacturers are not required to decrypt their customers' communications unless the telecommunications service provider or manufacturer supplied the encryption technology and can decrypt the communications without undergoing a design change or reconfiguration of the technology.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

The period for which telecommunications providers and infrastructure operators must retain information varies. Telecommunications carriers providing toll services must retain records that provide billing information about the telephone toll calls for 18 months. A state PUC may require telecommunications carriers to retain call records for up to three years.

ECPA provides that a governmental entity may require that a telecommunications service provider maintain the contents of wire or electronic communications for a period of 180 days, and, in some instances, a back-up copy of the communications, so long as the governmental entity receives a court order or subpoena requiring disclosure.

The FCC's Customer Proprietary Network Information ("CPNI") rules require that telecommunications carriers maintain records of disclosures of and third-party access to customers' CPNI for at least one year.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Audio-visual media services are regulated differently based on the nature of the technology used to distribute the content. Broadcast television services are heavily regulated under Title III of the Communications Act of 1934 and Parts 73, 74, and 79 of the FCC's rules. By comparison, cable service providers are more lightly regulated by Title VI of the Communications Act and Parts 76 and 78 of the Commission's rules and satellite providers by Title III and Part 25. Cable operators, in addition to federal regulations, are subject to regulations at the state and local level by franchising authorities. The FCC is considering whether to regulate audio-visual media services delivered over the internet (i.e., over-the-top ("OTT")) similar to other subscription-based, MVPDs.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Like distribution of audio-visual media, content is regulated differently based on the technology used to deliver it. Content delivered by over-the-air broadcast is more strictly regulated than cable, satellite television (referred to as direct broadcast satellite or DBS), or OTT, because it is free and readily available on a non-subscription basis. Federal law, for example, prohibits broadcast of obscene content altogether and prohibits broadcast of indecent and profane content between the hours of 6:00 a.m. and 10:00 p.m. local time. Although obscene content is not protected by the First Amendment of the U.S. Constitution and, therefore, prohibited across all audio-visual media platforms, broadcast indecency and profanity rules do not apply to cable, DBS, or OTT services. Broadcast television stations are required to air at least three hours of educational and informational ("E/I") children's television programming every week, and stations can air no more than 12 minutes of advertisements each hour on weekdays and 10 ½ minutes per hour on weekends while airing children's programming. Local franchising authorities may require cable operators to set aside channels for public, educational, or governmental ("PEG") use, and both cable and DBS operators are subject to advertising restrictions during children's programming. Broadcast providers must also comply with sponsorship identification rules. Guidelines concerning endorsements and testimonials released by the FTC, however, apply universally across all platforms.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

Both broadcast television and satellite television providers operate pursuant to a licence issued by the FCC. The licensee is authorised to operate on specified radio frequencies and must adhere to certain service terms, conditions and technical requirements. Television broadcasters must comply with several service rules, including obligations to air E/I programming, advertising for political candidates, emergency alerts, and community interest programming, as well as adhere to media ownership restrictions. DBS operators have retransmission, programme carriage, and emergency alert obligations, and must dedicate 4% of their capacity to non-commercial, educational programming.

Cable operators are authorised by local franchising authorities, which typically grant one or more franchises within their jurisdiction access to public rights-of-way and easements to deploy the cable system. The local franchising authority also regulates cable service and equipment rates. Several key obligations of cable providers include setting aside channels for PEG use and complying with signal

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carriage requirements, coverage obligations, and system ownership rules. If a cable operator owns or controls a programming network, it must make its affiliated programming available to competing MVPDs on non-discriminatory rates, terms, and conditions, as well as avoid favouring affiliated networks over those unaffiliated. There is no licensing requirement for provision of OTT service.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

A licensee may transfer or assign control of its spectrum licence with prior approval from the FCC. The agency first reviews all transfer and assignment applications to determine whether the public interest, convenience, and necessity would be served. As part of that review, the FCC typically releases a public notice seeking comment from the public. Non-controversial applications – those not involving issues of foreign ownership, requests for rule waivers, or materially affecting marketplace competition or other public policy concerns – face a lesser degree of scrutiny.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Internet service providers are not considered the publisher or speaker of content provided by third parties, and they are generally immune from liability for restricting access to obscenity and other objectionable content on the internet. Courts have ruled that telecommunications operators and internet service providers are neutral conduits for the transmission of others' speech.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Internet service providers must comply with the safe harbor provisions of the Digital Millennium Copyright Act to guarantee their immunity from copyright infringement for actions taken by their customers. Internet service providers may be required by a court to disclose the identities of customers who are alleged to have infringed copyright and to disconnect customers who are repeat copyright infringers.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The FCC adopted new net neutrality regulations in 2015 after a federal court partially invalidated the FCC's 2010 net neutrality regulations. The rules prohibit internet service providers from blocking or throttling lawful internet traffic and from entering into paid prioritisation arrangements with content providers. Conduct that does not fall within these bright line rules is reviewed under an "internet conduct" standard that prohibits internet service providers from unreasonably interfering with internet traffic. Differential pricing in the form of sponsored data and zero rating is permissible under the net neutrality rules, although the FCC is currently examining these practices. A federal court sustained the FCC's 2015 net neutrality rules. However, in May 2017 the FCC launched a proceeding to review these net neutrality regulations.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Internet service providers are prohibited from blocking access to certain sites or content, including virtual private network ("VPN") services, although they are permitted to engage in reasonable network management, which may include blocking of unwanted or harmful content.

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Vietnam

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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Telecoms and internet

The telecoms sector is very important in Vietnam and is becoming one of the country's key economic sectors. Over the past 10 years, telecoms, including the internet, and information technology have witnessed high growth and remarkable development, creating new momentum for economic and social development as well as international integration.

Viettel, VNPT and Mobifone continue to be dominant companies in the telecom market with continued growth and high profits. In 2016, Viettel earned profits of approximately USD 1.9 billion, VNPT earned profits of approximately USD 191 million, and Mobifone earned profits of approximately USD 229 million.

Vietnam's internet market in 2013 had an overall revenue of USD 965.45 million, and is dominated by VNPT (51.27% of market share by subscribers), Viettel (38.99% of market share by subscribers) and FPT Telecom (6.17% of market share by subscribers).

Audio-visual media distribution

Vietnam has three main nationwide-coverage stations under state management at the central level, namely the Voice of Vietnam (VOV), Vietnam Television (VTV) and Digital Television (VTC), and 67 local radio and television stations.

Pay TV is a market with great potential. By the end of 2016, Vietnam had 30 pay TV service providers with 79 programme channels, including 40 foreign programme channels, and approximately 12.5 million subscribers, with the total revenue reaching USD 528 million. There are five types of pay TV services categorised by technology, i.e., cable TV (including IPTV), terrestrial TV, satellite TV, mobile TV, and internet TV, of which cable TV holds a dominant market position, accounting for 80.8% market share with 9.9 million subscribers in 2015. Key pay TV service providers include Saigontourist Cable TV (SCTV), VTVcab and K+. The legal framework for pay TV, film production, film distribution and film projection in Vietnam is open to foreign investment.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The most important legislation which applies to the telecoms, audio-visual media distribution, and internet sectors includes:

- Law on Telecommunications No. 41/2009/QH12 adopted by the National Assembly of Vietnam on 23 November 2009 ("**Law on Telecommunications**");
- Law on Radio Frequency No. 42/2009/QH12 adopted by the National Assembly of Vietnam on 23 November 2009 ("**Law on Radio Frequency**");
- Law on Information Technology No. 67/2006/QH11 adopted by the National Assembly of Vietnam on 29 June 2006 ("**IT Law**");
- Law on Press No. 103/2016/QH13 adopted by the National Assembly of Vietnam on 5 April 2016 ("**Law on Press**");
- Law on Cinematography No. 62/2006/QH11 adopted by the National Assembly of Vietnam on 29 June 2006 as amended by Law No. 31/2009/QH12 on 18 June 2009 ("**Law on Cinematography**");
- Decree No. 06/2016/ND-CP of the Government dated 18 January 2016 on management, provision and use of radio and television services ("**Decree 06**"); and
- Decree No. 72/2013/ND-CP of the Government dated 15 July 2013 on management, provision and use of internet services and online information ("**Decree 72**").

There are also a considerable number of decrees and circulars to implement the key legislation mentioned above.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors include:

- Ministry of Information and Communications (**MIC**);
- Vietnam Telecom Authority (**VNTA**) under the MIC;
- Authority of Radio Frequency Management (**ARFM**) under the MIC;

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- Authority for Broadcasting and Electronic Information (**ABEI**) under the MIC; and
- Vietnam E-Commerce and Information Technology Agency (**VECITA**) under the Ministry of Industry and Trade (**MOIT**).

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment?

Telecom and internet (internet services are a considered a type of telecom services)

There are two types of investment in telecoms, namely facilities-based services or non-facilities-based services. In the telecommunications sector, foreign investors in business cooperation contracts will have the possibility to renew current arrangements or to convert them into another form of establishment with conditions no less favourable than those they currently enjoy.

Investment in facilities-based basic telecom services is allowed through joint ventures with licensed telecom service providers. Foreign capital contribution may not exceed 49% of legal capital of the joint ventures.

For investment in non-facilities-based basic telecom services, joint ventures are allowed without limitation on the choice of partner. Foreign capital contribution may not exceed 65% of the legal capital of the joint ventures. For virtual private network (VPN) services, foreign capital contribution may not exceed 70% of the legal capital.

Investment in facilities-based value-added telecom services is allowed through business cooperation contracts or joint ventures with licensed telecom service providers in Vietnam. Foreign capital contribution may not exceed 50% of the legal capital of the joint ventures.

For investment in non-facilities-based value-added telecom services (except internet access services), business cooperation contracts or joint ventures are allowed without limitation on the choice of partner. Foreign capital contribution may not exceed 65% of the legal capital of the joint ventures.

Audio-visual media distribution

In respect of motion picture production, distribution, and projection services, all films must have their content censored by the Vietnam authorities.

For motion picture distribution (with certain exceptions), investment is allowed through business cooperation contracts or joint ventures with Vietnamese partners who are authorised to provide these services in Vietnam. Foreign capital contribution may not exceed 51% of the legal capital of the joint venture.

In respect of pay TV service provision, foreign investment is subject to approval in principle by the Prime Minister.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Yes, Vietnam has been a member of the World Trade Organization since 11 January 2007 and has made commitments under the GATS regarding telecommunications, and has also made commitments to comply with the telecoms reference paper.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Under telecom legislation, the provision of public telecom networks and services requires a licence. There are two types of licences, namely: (i) a licence for the establishment of public telecom network issued to enterprises with network infrastructure providing telecom services, valid for a maximum of 15 years; and (ii) a licence for the provision of telecom services issued to enterprises without network infrastructure providing telecom services, valid for a maximum of 10 years.

After the maximum terms set out above, both licences can be re-applied for.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The main competition law authority is the Vietnam Competition Authority (VCA) under the MOIT. The VCA is established by the Government within the organisational system of the MOIT and has legal status, and a separate seal and account.

The main functions of the VCA are to monitor acts which may be deemed anti-competitive or which may promote unfair competition; protect the interests of businesses and consumers from antitrust behaviour; protect consumer rights; create a healthier competitive environment for the domestic manufacturing industry; and support domestic industries to prevent lawsuits related to dumping, subsidies and safeguard measures. The VCA is the general competition regulator in Vietnam and has authority to enforce anti-competition regulations across different industries, including the telecom sector.

However, the VCA would coordinate with a specialised telecom regulator (for example, the VNTA) for opinions when dealing with anti-competitive practices in the telecom sector.

The VNTA and the VCA could be considered as quasi-independent regulators.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Yes, decisions of a national regulatory authority (for example, the VNTA or the VCA) can be appealed. The complainant could appeal within the organisation (i.e., first appeal to the Director of the VNTA, then appeal to the Minister of the MIC) in accordance with the Law on Complaints, or institute an administrative claim in court in accordance with the Law on Administrative Procedures.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

Individual licences are used in Vietnam for the provision of public telecom services. As discussed under question 2.2, there are two types of public telecom licences: (i) a licence for the establishment

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of public telecom networks; and (ii) a licence for the provision of telecom services.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

The main requirements for a licence for the establishment of public telecom networks include:

Legal capital and commitment on investment: Depending on the type of network (e.g., terrestrial fixed network or terrestrial mobile network), network coverage (i.e., how many provinces the network covers), and whether there is a need to use the frequency spectrum, the required legal capital varies from VND 5 billion to VND 500 billion (USD 224,000 to USD 22.4 million). The investors' commitment on investment also varies from VND 15 billion (USD 673,000) for the first three years to VND 7,500 billion (USD 340 million) for 15 years.

The main requirements for a licence for the provision of telecom services include:

An enterprise that applies for a licence to provide terrestrial mobile services, if it owns more than 20% of charter capital or shares in a telecommunication enterprise, is not allowed to possess more than 20% of the charter capital or shares of other telecommunication enterprises doing business in the same market.

Other key requirements applicable to both licences discussed above include:

- Business lines: must have telecom business lines.
- Financial conditions: financially capable of implementing the licence in accordance with business and technical plans.
- Organisational structure and personnel conditions: must be suitable for the business plan, technical plan, and the plan for ensuring the safety of telecom infrastructure and information security.
- Business and technical conditions: must have technical and business plans.
- Telecom infrastructure safety and information security conditions: must provide a plan for ensuring the safety of the telecom infrastructure and information security in conformity with the business and technical plans.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

More details of different types of individual telecom licences in Vietnam are as follows:

- Licence for establishment of public telecom networks: valid for a maximum of 15 years.
- Licence for provision of telecom services: valid for a maximum of 10 years.
- Licence for telecom specialised operations:
  - Licence for installation of undersea telecom cable lines: valid for a maximum of 25 years.
  - Licence for establishment of private telecom network: valid for a maximum of 10 years.
  - Licence for trial of telecom network and services: valid for a maximum of one year.

Under telecom legislation, telecom numbering or internet resources can be transferred or assigned subject to certain conditions.

The telecom law does not expressly prohibit the transfer or assignment of telecom licences. A transfer or assignment of a mobile network must be conducted via specific auction and bidding procedures. The transferor or assignor must return the licence, negotiate with all partners, and, most importantly, ensure the rights of their users. There are also specific qualifications a transferee or assignee must meet.

In general, there is no express requirement on the change of control of the licensee, except the case where the licensee is listed as an enterprise in which the State is the controlling shareholder. Currently, there are five such telecom enterprises listed, which includes: i) Vietnam Post and Telecommunications Group (**VNPT**); ii) Viettel Group; iii) Vietnam Maritime Communication and Electronics Company (**VISHIPEL**); iv) Global Telecommunications Corporation (**GTEL**); and v) Indochina Telecom Joint Stock Company.

This means, in general, the licensee may liberally change its control. However, the change must be compliant with the requirements on foreign ownership restriction as briefly discussed in question 1.4 above.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Land ownership and use in Vietnam differs from many jurisdictions. Generally, land is owned collectively by the people and managed by the State.

Under the telecoms law, public telecom works are granted priority use of space, land surfaces, underground areas, riverbeds and sea floors. Locations for providing public telecom services will be granted priority at railway stations, car parks, seaports, airports, border gates and other public places serving the needs of telecom service users.

The master planning for the construction of traffic works, urban zones, residential zones, industrial zones, economic zones and high-tech zones must contain master planning on passive telecom technical infrastructure to ensure uniformity and completeness during investment and construction, and must facilitate the establishment of telecom infrastructure and provision and use of telecom services.

The master planning on passive telecom technical infrastructure in localities must comply with the national master plan for the development of telecom and with local master plans on socio-economic development, and is a compulsory item of regional construction master planning, of urban construction master planning and of rural residential construction master planning.

Based on master planning on passive telecom technical infrastructure and the master plan and plans on land use as approved by the authorities, the relevant-level people's committee is responsible for allocating land for the construction of important telecom works related to national security or for using locations for the provision of public telecom services within the locality. Any investor preparing an investment project for important telecom works related to national security or using a location to provide public telecom services must specifically determine the area of land required to be used, prepare a plan for land compensation and site clearance, and implement the project after the relevant authority has approved the project and allocated land.

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Access and Interconnection

2.9 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

Interconnection is a right as well as an obligation of telecoms enterprises. Under the telecoms law, telecom enterprises have the right to interconnect their telecom networks with the telecom networks or services of other telecom enterprises, and are obligated to permit other telecom enterprises to interconnect with their own telecom networks or services.

The key principles for interconnecting telecom networks and services include:

- negotiations on the basis of ensuring fairness, reasonableness and compliance with the rights and interests of the participating parties;
- the effective use of telecom resources and telecom infrastructure;
- ensuring technical requirements on interconnection, and safety and integrity of telecom networks; and
- ensuring the lawful rights and interests of telecom service users and of related organisations and individuals.

Parties to a dispute may submit their dispute to the Vietnam Telecom Authority (**VNTA**) under the MIC for resolving their dispute in accordance with certain enumerated procedures.

The VNTA will facilitate negotiations between the relevant parties with a view to mediation. If, after the negotiation process, the parties are able to reach an agreement on the disputed content, the dispute will be settled according to their agreement. If the parties cannot reach an agreement, the VNTA will issue a decision on resolving the dispute. The parties have the right to lodge complaints or initiate claims against the VNTA resolution, but would in the meantime still need to implement the VNTA resolution.

2.10 Which operators are required to publish their standard interconnection contracts and/or prices?

Telecom enterprises holding "essential facilities" must prepare a standard-form interconnection agreement, register it with the specialised branch administrative body for telecom, and publicly announce it.

An essential facility is understood as an important component of telecom infrastructure wholly or largely under the monopolised possession of one or more telecom enterprises, for which the formation of a new replacement would not be economically and technically feasible.

2.11 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Yes, interconnection charges are subject to price and cost regulation. Telecom legislation requires that tariffs for telecom interconnection be formulated on the basis of cost price and divided in a reasonable way between segments making up the network or service stages without discrimination between the different types of services.

2.12 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Yes, telecom enterprises or groups of telecom enterprises in a dominant market position and telecom enterprises holding essential facilities must implement a separate statistics and accounting regime for the telecom services in which they hold a dominant market share to fix the prime cost of such dominant market share telecom services, and they cannot cross-subsidise telecom services for the purpose of unfair competition.

2.13 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

High-speed broadband networks are subject to regulation in the same way as other telecommunication services. Under the telecom law, there are requirements to share passive infrastructure such as ducts or poles. The telecom authority will issue a decision on common use of passive telecom infrastructure in order to ensure the requirements on competition, environment and urban planning.

In terms of investment incentives, high-speed broadband networks could qualify as "high-tech activities" or "investment in development and operation, and management of infrastructure facilities"; thus, in theory, could apply for investment incentives in the following forms: (i) a lower rate of corporate income tax for a definite period or for the whole duration of implementation of the investment project; and exemption from or reduction of corporate income tax; (ii) exemption from import duty in respect of goods imported to form fixed assets; or raw materials, supplies and components for implementation of an investment project; and (iii) exemption from or reduction of land rent, land use fees and land use tax.

Price and Consumer Regulation

2.14 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The MIC determines telecom charges and tariffs of public-utility telecom services and interconnection.

Telecom enterprises in a dominant market position, prior to their issuance and application of telecom charges for market-dominant telecom services, must register their telecom charges with the telecom authority.

Telecom enterprises can determine charges for other telecom services outside of the above-mentioned services but must notify the telecom authority.

Telecom enterprises are not allowed to provide telecom services at a rate which is much lower than average rates in the telecom market as set out by the MIC.

Telecom enterprises holding essential facilities are not allowed to apply telecom service rates lower than their costs.

The MIC may intervene in determining and managing telecom charges and tariffs when telecom service charges increase or decrease unreasonably compared with costs, or increase or decrease abnormally

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compared with average rates, resulting in instability in the telecom market, or causing harm to the legal rights and interests of telecom service users, other telecommunication enterprises, and the State.

2.15 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The provision of electronic communication services to consumers is subject to mandatory quality control for certain types of services (for example, telephone services via terrestrial fixed telecom networks, telephone services via terrestrial mobile telecom networks, terrestrial fixed broadband internet access services using xDSL, among others).

In addition, the confidentiality of personal information transmitted via a public telecom network must be protected. Telecom enterprises may not disclose personal information about a telecom service user (including the user's name and address, the number and location of the transmitting or receiving server, times of calls and other personal information supplied by the user when contracting with such enterprise).

There are certain exceptions to the above, such as: (i) where the telecom service user consents to the provision of the information; (ii) the provision of information is for the purpose of calculation of tariff charges, preparation of invoices or preventing the evasion of contractual obligations; or (iii) where there is a request from a competent authority made in accordance with law.

Universal telecom services (i.e., public telecom services provided to all citizens in accordance with the list announced by the State) must be provided according to the conditions, with the quality and at the tariffs stipulated by the State.

Numbering

2.16 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identifying codes can be allocated via auction or a "beauty contest" (a competition to win the right to use telecom numbers) for numbers with high commercial value (such as numbers that can be easily remembered) and for which the number of applicants exceeds the allocating capacity, or can be directly allocated according to a plan on the principle that the first registered applicant will be considered for the first issuance or right to use, or other methods of allocation as may be set out by law. Telephone numbers and network identifying codes are allocated by the MIC.

2.17 Are there any special rules which govern the use of telephone numbers?

The use of telephone numbers is regulated under the telecom law and in detail under Circular No. 25/2015/TT-BTTTT dated 9 September 2015 on the management and use of telecom numbering.

2.18 Are there any obligations requiring number portability?

Following international practices, Vietnam promulgated Decision 1178/QD-BTTTT on 23 September 2013 on number portability, as amended by Decision 846/QD-BTTTT on 23 May 2016 providing a roadmap to implement number portability which shall officially start before 31 December 2017.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The MIC is the authority regulating spectrum use.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Organisations and individuals that wish to use radio frequencies must obtain the relevant radio frequency use licences.

Radio frequency use licences include radio frequency and equipment use licences, frequency band use licences and frequency and satellite orbit use licences.

Licences can be issued through the following methods: (i) direct licensing; (ii) licensing through examinations to select entities eligible for the right to use a radio frequency; and (iii) licensing through an auction of the right to use a radio frequency.

Licensing through auction or examination to select entities eligible for the right to use a radio frequency will be applied to frequency bands or channels of high commercial value for which the demands for use exceed the allocation capacity indicated in the radio frequency master plan. The radio frequency master plans are approved by the Prime Minister or the Minister of the MIC. In addition, participants in auctions or examinations must be eligible organisations for telecom network establishment licences.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The current Law on Radio Frequency has some licensing exemptions for radio equipment. Accordingly, the following radio equipment is exempted from the radio frequency use licensing: (i) short-range radio equipment being used in short-range, limited capacity and unlikely to cause harmful interference, which is on the list of radio equipment exempt from radio frequency use licensing; and (ii) radio equipment installed onboard foreign seagoing ships or airplanes traveling through Vietnamese territory, which are exempt from licensing under international agreements or treaties to which Vietnam is a contracting party.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The fees for granting licences depend on the type of radio frequency use licenses and must be in Vietnamese dong. Under current regulations, the fees are in a range of VND 50,000 to VND 10 million (approximately USD 23 to USD 454, at the time of this writing).

In addition, fees for radio frequency use are charged annually. These charges are determined by several factors, including: (i) the basis of the economic value of the radio frequency used; (ii) the purpose of use; (iii) the level of radio frequency spectrum occupancy; (iv) the service coverage; (v) the demand for and level of use of frequency channels in the frequency band; (vi) the

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geographic area in which the radio frequency is used; (vii) expenses for the management of radio frequencies; and (viii) the realisation of relevant state policies in each period. There are multiple types of applicable fees for radio frequency use and such fees will depend on the frequency or equipment used.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

In most cases, there are no changes to spectrum licences if there is a change of control of the licensee.

In Vietnam, a local company will have an Enterprise Registration Certificate (ERC) for business registration, which is issued by the company registration authority (i.e., the Department of Planning and Investment). An ERC is very roughly akin to a certificate of incorporation in certain other jurisdictions.

After obtaining the ERC, to have the radio frequency, the company must obtain a sub-licence which is the radio frequency use licence. The company would need to notify the radio frequency management licensing authority of any changes to the content of the radio frequency use licence. However, the radio frequency use licences do not contain information on the founding shareholders or the equity members of the licensees. Thus, a change of control of the licensee typically would have no effect on that licence.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Under the Law on radio Frequency, radio frequency use licences can be assigned to other entities under specific conditions, such as:

- only organisations licensed to use a frequency band or channel through auction and also having exploited and used such bands or frequency channels for at least three years may transfer the right to use of a radio frequency to other organisations;
- the licence for transfer must be a valid licence;
- organisations receiving the right to use a radio frequency must meet the conditions for participants in an auction or examination to select entities eligible for the right to use radio frequencies specified by the law;
- the transfer must be approved in writing by the MIC; and
- the parties involved in the transfer must fulfill tax obligations under tax laws.

Under very limited instances, leasing or lending radio frequencies may be possible.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Vietnam's Law on Cyber-Information Security ("**LCIS**") was passed on November 19, 2015, and took effect on July 1, 2016. The LCIS is the first comprehensive law ever issued in Vietnam on the security of "cyber-information", which is information exchanged in a telecommunications or computer network environment. Previous regulations on the subject had been scattered throughout different pieces of legislation, such as the Law on Information Technology; the Law on Telecommunications; the Law on E-Transactions; Decree 72 on the management, provision, and use of Internet services and online information; the Penal Code; and information security regulations for specific sectors such as banking and finance.

The key aspects of the LCIS include assurances for the safety and security of cyber-information; protection of personal information in the network environment; protection of information systems and infrastructure; production, trading, and use of civil ciphers; standards and technical regulations on information security; provision of information security services; prevention of spam, computer viruses, and harmful software; and emergency responses.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Vietnamese laws empower certain government authorities in inspections and investigations which would allow them to obtain access to private communication. The authorities in Vietnam, such as the Inspectorate of the Ministry of Information and Communications and the investigation agencies of the People's Police are empowered with wide authority to request the supply of information from organisations and individuals. In particular, the government authorities may have the power to access and examine information, equipment or systems of the relevant parties if there is a suspected violation of relevant laws and regulations.

These powers are set out in various laws and regulations, including:

(i) Law on Information Technology No. 67/2006/QH11 adopted by the National Assembly of Vietnam on 29 June 2006 ("**IT Law**");

(ii) Law on Telecommunications No. 41/2009/QH12 adopted by the National Assembly of Vietnam on 23 November 2009 ("**Law on Telecommunications**");

(iii) Law on Cyber-Information Security No. 86/2015/QH13 adopted by the National Assembly of Vietnam on 19 November 2015 ("**LCIS**");

(iv) Law on Inspection No. 56/2010/QH12 adopted by the National Assembly of Vietnam on 15 November 2010 ("**Inspection Law**"); and

(v) Law on National Security No. 32/2004/QH11 adopted by the National Assembly of Vietnam on 3 December 2004 ("**Law on National Security**").

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

There is no provision under Vietnamese laws requiring market participants to maintain call intercept capacities.

4.4 How does the state intercept communications for a particular individual?

With their statutorily provided powers in inspections and investigations as discussed in question 4.2 above, the inspectorate and the investigation agencies, with proper search warrants, may access systems of telecom enterprises to intercept communications for a particular individual.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The use of encryption products and services in the private sector

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is regulated under the LCIS. The LCIS provides, among other matters, that individuals/organisations using encryption are under the obligations of:

(i) complying with provisions as agreed with the enterprise providing encryption products regarding the use of encryption keys, transfer, repair, maintenance, cancellation or destroying of encryption products and other relevant contents;

(ii) providing necessary information relating to encryption keys for the authorities if requested;

(iii) coordinating with and facilitating the authorities to carry out actions to prevent criminals from stealing information or encryption and using encryption products for illegal purposes; and

(iv) reporting to the Government Cipher Committee if they are using encryption products which are not provided by permitted enterprises, except for foreign diplomatic and consulate organisations and international organisation representative offices in Vietnam.

Under item (ii) above, the government authorities can request individuals or organisations using encryption to provide encryption keys. However, the LCIS and its guiding decree do not further clarify in which circumstances a government request can be made.

However, under the legislation cited in question 4.1 above, especially under the Inspection Law and the Law on National Security, the authorities might be able to base their request to provide encryption keys on other legislation depending on the matter at hand.

4.6 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Internet service providers are to retain posted and transmitted information for 15 days, and internet agents are to store posted and transmitted information for at least 30 days on their servers.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

Audio-visual media distribution activities are "conditional" businesses which require organisations to be licensed to engage in these activities.

For our discussion, we classify audio-visual media into two categories: **(i) radio and television broadcasting**; and **(ii) motion pictures**.

(i) Radio and television broadcasting

Under Vietnam law, the provision of radio and television services can be offered as both free broadcasting services ("free TV") and fee-based broadcasting services ("pay TV"). An organisation wishing to provide radio and television services would need to obtain a licence to operate in the broadcasting industry.

- Free TV may only broadcast Vietnamese channels (defined as radio or television channels lawfully produced or co-produced by Vietnamese news agencies licensed to operate in the broadcasting industry).
- Pay TV may broadcast both Vietnamese and foreign channels (defined as radio or television channels lawfully produced by foreign broadcasters and made in foreign languages). The number of foreign channels broadcasting on pay TV is limited to 30% of the total number of channels. A pay TV provider must register a list of programmes to be broadcasted in all of its Vietnamese and foreign channels.
- A foreign channel must obtain a certificate of registration for the provision of subscription services in Vietnam. A foreign channel provider must also have a Vietnamese agent (who is authorised to provide foreign channels on pay TV) apply for such certificate and fulfil its financial obligations to the State of Vietnam. The broadcasted contents of foreign channels must comply with Vietnamese laws and need to be edited and translated by an agency that is licensed to edit foreign channels. The editing agency is responsible for the content of their translations and editing.

The conditions for operating in radio and television services are mainly governed by the Law on Press No. 103/2016/QH13 adopted by the National Assembly on 5 April 2016 ("**Law on Press**") and Decree No. 06/2016/ND-CP of the Government dated 18 January 2016 on management provision and use of radio and television services ("**Decree 06**").

(ii) Motion pictures

Motion picture distribution is regulated under the Law on Cinematography No. 62/2006/QH11 passed by the National Assembly on 29 June 2006, as amended by Law No. 31/2009/QH12 on 18 June 2009 ("**Law on Cinematography**") and its guiding legislation.

All motion pictures produced, distributed and projected in Vietnam need to have their content censored by Vietnam's competent authorities. Motion pictures may only be distributed (i.e., the process of circulating films in the forms of sale, rental, export and import) and disseminated (i.e., the introduction of films to the public by means of projection, broadcasting on television, or posting on the internet and other audio-visual media) when they have the proper permits granted by the relevant cinematography state management agency.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Generally, no. Vietnamese laws do not distinguish between content broadcast via traditional distribution platforms and content delivered over the internet or other platforms for content regulation purposes.

The laws generally prohibit the provision and spreading of content which is considered to constitute "social evils", such as, among others, content related to pornography; inciting violence, obscenity, depravity, or crime; undermining national security, social order, safety and fine traditions and customs; violating requirements of protecting children against negative impacts; defamation; IP infringement of trademarks or copyrights, and spreading viruses and harmful software.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

Please see the response to question 5.1.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

The law is silent on whether the licences are assignable. There are no rules or restrictions on the change of control of the licensee.

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6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

We are not aware of any court's interpretation or application of any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators or internet service providers from liability for content carried over their networks.

Under the IT Law, in general, intermediaries or service providers for hosting, storing or transmitting content of third parties have a "safe harbour" in that they will not be liable for the content of third parties if they are just intermediaries. However, they will need to take down the content in certain instances.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

There is no provision under the laws requiring telecommunications operators or internet service providers to assist content owners whose rights may be infringed by means of file-sharing or other activities.

That said, telecommunications operators or internet service providers would need to comply with court orders or administrative decisions in, for example, the intellectual property space if such orders or decisions mandate take-down actions where intellectual property owners have successfully contended that their intellectual property rights have been infringed by, for example, a hosted website.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Under the Law on Telecommunications, the key principles for determining telecommunications charge rates are keeping the management and stipulation of telecommunications charge rates non-discriminatory (except where necessary to encourage new businesses to participate in the market) and ensuring a fair competition environment.

The Law on Telecommunications generally prohibits: (i) the disclosure of state secrets, military, security, economic or other confidential information specified by law; (ii) undermining national security, social order, safety and fine traditions and customs; (iii) stealthily retrieving, eavesdropping on or accessing without permission information on telecommunications networks; (iv) hacking and using without permission telecommunications resources, passwords, keywords and private information of other organisations and individuals; (v) spreading information to distort, slander or bring down the prestige of organisations or honour and dignity of individuals; (vi) advertising, propagating or trading in illegal goods or services; and (vii) illegally obstructing, disrupting or undermining the establishment of the telecommunications infrastructure or the lawful provision and use of telecommunications services.

Telecom service agents have the right to refuse to provide telecommunications services to users who are in violation of the above.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Telecommunications operators and internet service providers may be under obligations to block access to certain sites or content if the authorities properly request.

The Law on Telecommunications provides that the government authorities can request telecommunication enterprises to take emergency preventive action and suspend the provision of telecommunication services in cases of riot, violence or use of telecom services to infringe upon national security or oppose the Socialist Republic of Vietnam.

Moreover, under the IT Law, individuals or organisations transmitting or storing digital information are liable for taking necessary actions to prevent access to digital information that they themselves discover is illegal, or as may be properly requested by the authorities.

VPN services are classified as telecommunication services under Vietnam's WTO commitments on services. Thus, they are regulated or blocked in the same way as other telecommunications services as described above.

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