

market intelligence

Telecoms & Media

Regulators remaining watchful
of consolidation

Global interview panel
covering key economies
led by Laurent Garzaniti

Regulatory developments • Major cases • Big Data • 2016 trends
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market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on global telecoms markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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Pedro Callol

TELECOMS & MEDIA IN SPAIN

Prior to founding Callol Coca & Asociados SLP, Pedro Callol was an equity partner leading the TMT, EU and competition law practice of one of Spain's largest corporate law firms; before this he created and led the TMT, EU and competition law practice of a London 'magic circle' law firm in Spain and prior to that he was an associate with Arnold & Porter in Washington, DC and London. He is dual qualified, in Spain and England, he holds an LLM from the College of Europe, Bruges and is a graduate of the University of Chicago Law School (Fulbright).

Other senior members on the firm's competition law team include Jorge Manzarbeitia (LLM, University College London), Manuel Cañadas (LLM, Université Catholique de Louvain) and Santiago Roca (LLM, King's College London).

The firm provides specialised assistance to national and international TMT clients in need of strategic advice. The firm's

work includes advising TV companies, Hollywood studios and telecommunications companies in a variety of regulatory, commercial and competition law matters; for example, advising in connection with the acquisition of the distribution rights portfolio of a media company by a competing media company; advising telecommunications companies and regional governments in connection with contentious and non-contentious matters related to financing of new-generation broadband networks; representing a movie distribution company in appellate and Supreme Court litigation regarding commercial conditions for exhibitors; advising a national open-broadcast TV network on the merger review by the national competition authority of Telefónica's acquisition of Digital+; advising a software company on competition-law issues related to an acquisition leading to high market shares; and advising a television company in connection with state-aid law issues.

GTDT: What were the key developments in communications and media regulation in your jurisdiction last year?

Pedro Callol: A key development in the regulatory landscape in Spain is the approval of new regulations governing Spain's wholesale fixed broadband market, which have been more than a year in the making.

The controversial new rules from the Spanish competition authority (CNMC) impose a number of obligations on Telefónica, Spain's incumbent operator and also identified by the CNMC as the operator with significant market power. At the end of 2015, 71.3 per cent of fibre-optic subscribers in Spain were served by Telefónica.

However, the stringency of these competition obligations varies depending on the geographic area. There are 66 locations that will escape regulation. In these 'competitive areas', representing about 35 per cent of the Spanish market, Telefónica will not be required to share its network because of the current existence of three or more companies offering high-speed broadband via FTTH or DOCSIS 3.0 cable connections.

The number of competitive areas has risen substantially from the 34 originally proposed in the CNMC draft document to 66. The watchdog's draft was based on data from 2014, but after the 2015 figures were taken into account the final

figure has risen, reflecting the accelerated pace of FTTH deployment in Spain.

In the remaining 65 per cent of the country, in the 'non-competitive areas', Telefónica will be required, within 18 months, to start providing other operators with virtual unbundled local access to its fibre-optic networks.

Even in locations that are free from fibre regulation, Telefónica is required to continue to provide wholesale access to its copper network and share its duct infrastructure – which has helped rivals Orange, Jazztel and Vodafone expand their fibre networks significantly in recent years.

In the business market, which is deemed to be less competitive, Telefónica must provide wholesale access to both its copper and fibre networks across the entire country.

The obligations will be in place for three years before review. In the meantime, the CNMC said it would continue to keep a close watch on the evolution of competition in the fixed broadband market.

Moreover, in July 2016 the CNMC opened a two-month public consultation into its proposal to maintain the obligation on Telefónica to give competing operators wholesale access to its fixed-line network. After assessing the market, the CNMC concluded that Telefónica retained significant market power, and it wanted to ensure alternative operators had easy access to fixed telephony networks to protect the 6.4 million users



"In the 'non-competitive areas', Telefónica will be required to start providing other operators with virtual unbundled local access to its fibre-optic networks."

in Spain who still do not yet have landline calls bundled with broadband plans.

However, the Spanish watchdog also proposes relaxing the wholesale obligations imposed on Telefónica by removing the preselection of wholesale lines and removing the rule prohibiting the operator from attempting to regain customers until four months after the wholesale application is activated.

GTDT: Does sector-specific regulation – as opposed to the general competition regime – play a significant role in your jurisdiction? Is this expected to change?

Jorge Manzarbeitia: Sector-specific regulation plays a significant role in Spain, although (rather in line with the EU regulatory package of directives) much of the current regime is competition law based. The Telecommunications Act, in line with the EU telecoms regulatory framework, establishes that the CNMC has powers to impose ex ante regulatory obligations on undertakings identified as having significant market power after analysing the conditions of competition in a given relevant telecommunications market.

GTDT: What is the attitude to net neutrality in your jurisdiction?

Manuel Cañadas: Net neutrality is not literally enshrined in Spanish law. However, the Telecommunications Act enables the government to fix minimum quality requirements for services provided by telecommunications companies to prevent deterioration of the service and the slowing down of traffic on the net. Consequently, the Spanish government approved a ministerial order, based on the Charter of Rights, aimed at users of electronic communications services, establishing requirements on information, transparency and quality levels. The debate on net neutrality has been on the table for some years, but while it has declared itself in favour of this principle, the Spanish government has not adopted any strong measures in this regard. As in other EU member states, Spain is still awaiting the implementation of clear rules resulting from the EU initiative in favour of net neutrality. Antitrust policy plays a significant role in determining the degree of net neutrality. Net neutrality is necessary to ensure that internet access providers do not inhibit competition by blocking consumers' use of independent services, such as VoIP or other over-the-top (OTT) services. Should telecoms companies seek payment, the barriers to entry could be insurmountable for many independent OTT providers. Banning this kind of practice is regarded as a priority by the EU and to an extent the principle is being accepted in national practice.

In June 2016, the Body of European Regulators for Electronic Communications published for public consultation draft guidelines (the



Jorge Manzarbeitia

BEREC Guidelines) on the implementation by regulators of new net neutrality rules and is seeking the views of stakeholders.

The BEREC Guidelines, drafted in accordance with Regulation (EU) 2015/2120 (the Telecoms Single Market Regulation), are designed to provide guidance on the implementation of the obligations of National Regulatory Authorities (NRAs). Specifically, this includes the obligations to closely monitor and ensure compliance with the rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-user rights. The BEREC Guidelines constitute recommendations to NRAs, who should take the utmost account of the Guidelines. The BEREC Guidelines should contribute to the consistent application of the Telecoms Single Market Regulation, thereby contributing to regulatory certainty for stakeholders.

GTDT: What is the regulator's approach to over-the-top services?

MC: These services are not specifically regulated in Spain. According to market statistics, 36 per cent of EU citizens used OTT VoIP services in 2014. OTT providers are turning into competitors of telecoms companies. The European Commission and the CNMC seem to be accepting this kind of reasoning. On the one hand, subjecting OTTs to burdensome regulation could be detrimental to their innovation. On the other hand, maintaining the current asymmetric regulatory framework could reduce incentives for telecoms companies to invest in high-capacity networks, probably reducing the benefit to end

users of competitive, affordable and high-quality connectivity. Moreover, the CNMC recently found that OTT services do not constitute a sufficiently adequate alternative to Telefónica's traditional phone network to warrant regulating this market separately. In contrast to other countries, almost all broadband clients in Spain are charged a flat fee for national calls and, therefore, OTT services focus on international calls.

GTDT: *Has there been any recent granting of spectrum? Are any significant grants planned in the near future?*

PC: The CNMC recently proposed that the Ministry of Industry, Energy and Tourism (MINETUR) amend the regulation on the use of public radio spectrum (IPN/DTSA/026/15/ Reglamento espectro) to expand the amount of available spectrum. The CNMC understands that the upward revision of the limits would represent 'significant benefits for operators who currently are limited in their ability to acquire new spectrum'.

After the Vodafone/ONO and Orange/Jazztel mergers, both resulting operators exceeded the spectrum limit and had to return some of their allotted frequency to MINETUR. Under previous regulations, introduced in 2011, Spanish mobile operators spectrum holdings were capped at 185MHz across all bands, with a 135MHz limit in high-frequency bands (1,800MHz, 2,100MHz, 2.6GHz and 3.5GHz) and 2x25MHz in lower bands (sub 1GHz). Under the revised legislation, in the

higher bands a new cap of 210MHz will apply on the basis that the frequency holder offers wholesale access with 'reasonable conditions'. No change to the cap for the lower bands has been made, however.

Additionally, the CNMC proposes a closer monitoring of the use of public radio spectrum, saying that such a move is 'essential' to ensure that companies are using spectrum effectively and efficiently and to avoid 'speculative hoarding and anticompetitive rights use'. According to the CNMC, MINETUR has a wealth of information that would allow it to carry out such monitoring. The CNMC proposes that the monitoring should also cover bands commonly used for Wi-Fi technology. Furthermore, it has also suggested that, to avoid competition issues with regard to spectrum-sharing, a mandatory report should be produced that would allow for the implementation of commitments in frequency-sharing agreements. Finally, the CNMC has recommended tweaking existing regulations to ensure that virtual mobile operators (VMOs) do not face an 'additional barrier to the already difficult process' of negotiating new or updated deals with the nation's network operators.

GTDT: *How has the debate about 'big data' played out in your jurisdiction? What has the debate focused on?*

Santiago Roca: The debate has focused on the fact that regulation of data protection is not evolving at the same pace as big data technology itself. Thus, there is a call for increased regulation to ensure the privacy of users. In Spain, the debate does not differ substantially from the discussion at EU level. The Spanish Data Protection Act regulates certain aspects that may affect big data technology - so there is an explicit limitation on data-sharing that permits individual user identification. However, current legislation is generally insufficient to deal with the issues posed by big data. Looking ahead, regulation of the area should take into account not only data protection issues, but also other issues, such as strategic use of big data to provide a competitive advantage, or leveraging big data to gain a competitive advantage in neighbouring markets - all of which may in some circumstances lead to market foreclosure and be relevant under competition law. The concerns spelled out generally in the recent joint report by the French and German national competition authorities on data and more specifically in merger reviews (such as the Facebook/WhatsApp review by the European Commission) are broadly shared in Spain, although they have not yet been developed concretely at the national level.



Manuel Cañadas

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

These are extremely fast-moving markets, so sound industry knowledge and knowledge of the market players and the authorities is essential to be able to identify opportunities for clients and address clients' needs. Familiarity with IT and technology (something that is not necessarily obvious for lawyers) also helps. A working knowledge of microeconomics, industrial organisation and familiarity with the tools of economic analysis of law are also extremely helpful. The practitioner in this area requires a sound knowledge of competition law, administrative procedure (because of the importance of dealings with regulatory agencies that are governed by administrative law) and a good knowledge of the regulators' structure, uses, procedures and individuals.

What are the key things for the parties and their advisers to get right when dealing with a case in this area?

It really depends on the kind of job or assignment. Generally, though, our work in this area is very strategic, both when advising on regulatory aspects of M&A transactions and when advising on purely regulatory or litigation matters. Clients understand that many of these matters require in-depth understanding and careful planning to guarantee the best possible outcome. Therefore, adequate planning and working with the client on the technical

or technological aspects of the case (which the client is often much better positioned to understand than we are) are of the essence from the very early stages.

What were the most interesting or challenging cases you have dealt with in the past year?

Two cases we have advised on recently – and which we continue to advise on to an extent – are the acquisition of Digital+, Spain's largest pay TV operator, by Telefónica, and the acquisition of Milanuncios by Schibsted, both Phase II reviews currently being challenged in court. Both have been dealt with by the CNMC under the merger control laws. Both involved a complex appraisal of facts and law and have required heavy involvement and care by members of our team to guide the client properly. In the area of mergers, we have also advised third parties in the Orange acquisition of Jazztel. In the area of litigation, we have advised (and continue to advise) in a long-lasting litigation in the movie exhibition sector, through all stages of the administrative investigation and appellate and Supreme Court litigation. We also currently advise a provider of telecoms added-value services on various commercially sensitive matters.

**Pedro Callol, Jorge Manzarbeitia,
Manuel Cañadas & Santiago Roca**
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GTDT: What about media plurality? How have policymakers and regulators addressed this issue?

PC: The sector laws have traditionally contained ownership and cross-ownership restrictions in the media sector. These restrictions are currently contained in the Media Act. In summary, when it comes to ownership of television operators, no natural or legal person may acquire a significant stake in more than one national television operator whose average audience exceeds 27 per cent of the national share in the 12 months prior to the acquisition. 'Significant stake' is a legally defined concept that refers to rights-enabling (eg, the acquisition of 5 per cent or more of the capital of a television operator). Additional ownership restrictions are in place, for instance, for non-EU nationals and for operators accumulating substantial rights for multiplex channels.

Regarding radio ownership restrictions, among other restrictions, no individual entity

or person may control more than 50 per cent of the radio licences that coincide within their geographic scope. In any event, no single person or entity may control more than five radio licences in a single geographic space of radio coverage; nor may a single person or entity control more than one-third of the radio licences with nationwide coverage.

Antitrust law's specific goals are not generally related to the achievement or maintenance of media plurality. However, there are some old media-merger precedents where maintenance of media plurality was expressly mentioned by the NCA at the time (and antitrust laws take into account the idea that media plurality is a value worthy of protection; for example, article 21.4 of the EU Merger Regulation (No. 139/2004)). Furthermore, the current Competition Act enables the government to intervene in mergers that have either been prohibited or have been cleared subject to conditions. The intervention of the government is justified on grounds other



Santiago Roca

than competition law, including the guarantee of adequate maintenance of the sector's regulatory goals. Media plurality has been used as one of the goals justifying government intervention in recent media mergers, such as the television merger between Antena 3 and La Sexta.

GTDT: *Is the global trend for consolidation in the sector also visible in your jurisdiction? If so, what were the most prominent deals in the past year or so?*

PC: Since August 2015, and in contrast to the previous year, when several significant deals took place (*Telefónica/Digital+*, *Vodafone/ONO*, *Orange/Jazztel*), no major deals have happened in the telecoms and media sector in Spain.

GTDT: *Have there been any major antitrust cases in the communications and media sectors in your jurisdiction recently?*

PC & SR: These industries are key areas of enforcement for the CNMC. While the following are important cases in this field, it is by no means an exhaustive list. Also, some of these may go back in time a bit, but they are still very relevant background to the current activity in the area.

On 14 April 2010, the CNMC (at that time the CNC) ruled that exclusive contracts for acquisition and resale of football broadcasting rights lasting for more than three seasons for Spanish league and cup matches are anticompetitive. Notably, the CNMC issued its decision a few days after publication of the Media Act, which limits the maximum duration of exclusive football broadcasting rights agreements to four years, so the decision is not consistent with the Media Act on this point. The court in charge of the judicial review has confirmed the CNMC decision. This is an older case, but litigation in this particular area has had an impact well beyond the initial administrative decision of 2010 and is still felt

today; for instance, in the regulation of football broadcasting rights.

On 17 March 2011, the CNMC fined Mediapro (a media operator currently holding broadcasting rights for most Spanish clubs) and Gol TV (Mediapro's TV channel) for abuse of dominant position by unjustifiably denying other operators access to the distribution of broadcasting rights, thereby giving Gol TV a competitive advantage.

On 6 March 2014, the CNMC decided to end proceedings against Telefónica, Vodafone and Orange for allegedly abusing a collective dominant position. Subsequent to a complaint by British Telecommunications (BT) and its Spanish subsidiary, the CNMC initiated disciplinary proceedings against Telefónica, Vodafone and Orange for an alleged – and probably the first of its kind – collective margin squeeze in the market for wholesale voice call origination services.

In particular, BT claimed that Telefónica, Vodafone and Orange had consistently narrowed the operating margins for VMOs when setting the prices for wholesale voice call origination services, call termination services in their national mobile telephone networks and retail prices for mobile call services. According to the CNMC, to determine the existence of a margin squeeze, the 'equally efficient operator' test should be applied. The application of the test resulted in negative margins, therefore the CNMC initially concluded that the alleged margin squeeze had taken place.

However, the CNMC considered that the equally efficient operator test is not applicable in abuse of collective dominant position cases unless it can be evidenced that, regardless of the wholesale offer adopted by the VMO, the end result would invariably be a price squeeze. This conclusion was based on the fact that, in its assessment, the Investigation Directorate of the CNMC omitted the fact that in this case the VMOs had the option of changing their host operator to configure a viable offer. (The CNMC reasoned that the operator could have configured a viable offer to compete with Telefónica by switching to Orange as wholesale supplier.) In other words, the individual price-squeeze test is not appropriate in collective dominance situations, where the reasonable test is one of 'collective exclusion'. Given that the VMOs had viable offers at the upstream or wholesale level, and that, in fact, the market showed new entry by VMOs at the time of the alleged abuse, no exclusionary effects produced by the margin squeeze were proved.

On 19 December 2012, the CNMC found that Telefónica, Vodafone and Orange had infringed article 2 of the Competition Act and article 102 TFEU through abusive conduct in the wholesale telephone short message service (SMS) markets.

According to the CNMC, each of these operators has a monopoly in the services for SMS termination in their own network, enabling the three mobile operators to fix higher prices freely in the termination of SMS. Termination is a cost



“The CNMC believes the mobile networks market has shown movement towards fair competition, justifying a move towards deregulation.”

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that is passed on to consumers, which enables the operators to maintain higher retail prices in SMS.

The CNMC condemned the operators involved for an exploitative abuse of dominant position, setting record fines totalling €120 million.

On 24 July 2015, the CNMC fined Telefónica and DTS €15.5 million for having colluded on the acquisition, resale and exploitation of football broadcasting rights for the 2012/2013 and 2014/2015 seasons, in breach of national and EU antitrust regulations. DTS was found to have discriminated against other operators by giving Telefónica privileged treatment in the acquisition of Canal+ Liga, as well as Canal+ Liga de Campeones. The CNMC found that the practice restricted competition between pay TV operators in the bidding process.

Another interesting case has been the €26 million fine levied on Telefónica for imposing permanence obligations (which, if breached, lead to an increasing scale of penalties) on small and medium-sized enterprises, acting as a sort of exclusivity, banning client mobility.

It is worth mentioning, because of its Iberian dimension, the fine imposed on Telefónica and Portugal Telecom by the European Commission totalling €79 million for agreeing not to compete with each other on the Iberian telecommunication markets. In the context of the acquisition by Telefónica of the Brazilian mobile operator Vivo, previously jointly owned by Telefónica and Portugal Telecom, the parties deliberately agreed to stay out of each other's home markets (ie, the parties inserted a clause in the contract indicating they would not compete with each other in Spain and Portugal as from September 2010 to the end of 2011).

On 28 June 2016, the General Court of the European Union rejected Telefónica's and Portugal Telecom's appeal (judgments in Cases T-208/13 and T-216/13), other than

ordering the Commission to recalculate the fine according to the sales volumes linked to the illegal arrangement.

GTDT: What is your outlook for regulation in the communications and media sectors in the next two to three years? Are any major changes expected in your jurisdiction? If so, what do you predict will be the impact on business?

JM: The CNMC has launched a public consultation, wherein the Spanish watchdog has floated a plan to eliminate, over the following six months, a number of obligations imposed on the country's major mobile operators, including Telefónica, Vodafone and Orange. These obligations have, since 2006, forced the companies to give reasonable access at low prices to VMOs as a measure to stimulate the VMO sector.

There are now over 30 VMOs throughout Spain, following various business models and strategies. Together, these operators cover 10 per cent of the retail mobile market, and their appearance has been seen as a boon to competition in Spain's telecommunications sector. Currently, only two countries in Europe (Cyprus and Norway) have standing ex ante legislation regarding this market.

The CNMC has said it believes the mobile networks market has shown movement towards fair competition, justifying a move towards deregulation. Since 2006, when the obligations were imposed, wholesale prices for VMOs' access to networks have been progressively reduced, both in the data and voice segments.

In any event, the CNMC would in principle be able to intervene immediately in the event of a mobile network operator unjustifiably denying VMOs access to its mobile network.

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