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Global Practice Guides

TMT

Law and Practice – Belgium

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2018

BELGIUM

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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PETILLION has a four-strong TMT team which represent national and multi-national clients in the telecommunications industry. Its services include counselling clients on regulatory requirements such as licensing, access to and use of numbering capacity, lawful intercept obligations, data protection and retention requirements, contractual obligations and information requirements towards end-users, and value-added services; the practice also has an established expertise in competition law. **PETILLION** has a well-known internet governance practice, representing clients in landmark arbitrations related to the liberalisation of the internet and the accountability of ICANN. Further expertise includes cloud computing, apps, mobile

devices, VOIP, cookie technology, social networking and 4G technology. The team has significant experience in the field of e-commerce and in addressing specific internet issues, providing clients with counselling on all issues relating to their on-line presence and services, and assisting in proceedings against their competitors before the civil courts and in their interaction with regulatory bodies. Additionally, **PETILLION** are well respected for its experience in internet service-provider liability, regularly representing telecommunication and social network companies invoking the mere conduit and/or hosting exemptions under the e-commerce legislation.

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1. General Structure of TMT Regulation and Ownership

1.1 Statutes, Laws and Legislation

The Act of 13 June 2005 on electronic communications (Electronic Communications Act) is the principal law applicable to the telecoms, wireless, satellites, internet and broadband industries. It regulates the operation of electronic communications networks and the provision of electronic communications services on a federal level. The Electronic

Communications Act supersedes the Act of 21 March 1991 on the reform of some economic public companies, replacing most of its provisions.

The Electronic Communications Act implements the EU directives of the European electronic communications regulatory framework. This regulatory framework consists of:

- the Framework Directive 2002/21/EC;
- the Access Directive 2002/19/EC;
- the Authorisation Directive 2002/20/EC;
- the Universal Service Directive 2002/22/EC;
- the E-Privacy Directive 2002/58/EC;

This regulatory framework was amended in 2009, through the introduction of the Better Regulation Directive 2009/140/EC and the Citizens' Right Directive 2009/136/EC. In order to transpose the subsequent directives, the Belgian Electronic Communications Act was amended several times, mainly in 2012 and 2014. The latest amendment took place through the Act of 31 July 2017 incorporating various provisions regarding electronic communication. Many of the procedures and modalities covered in the Electronic Communications Act are implemented through various royal decrees.

Additionally, the internet industry is also regulated through book XII of the Belgian Code of Economic Law (CEL) which covers the law of the electronic economy. This section of the CEL is mainly the result of the implementation of the Directive on electronic commerce 2000/31/EC. It also covers domain name registration, electronic identification and trust services.

The launching into orbit and operation of satellites is regulated by the Act of 17 September 2005. It provides for a mandatory authorisation for all activities regarding the launch, flight operation, or guidance of a space object.

The statute and organisation of the federal regulator for the telecommunication industry, the Belgian Institute for Postal Services and Telecommunications (BIPT), is regulated in the Act of 17 January 2013.

As opposed to the telecoms and internet industry, the broadcasting and media industry is not regulated on a federal level in Belgium. As the provision of audio-visual media services implies matters related to language and culture, regulation falls under the competencies of the different communities, being the Dutch-speaking community of Flanders, the French-speaking community of Wallonia and the German-speaking community. Each has its own audio-visual media regulator. These are: the Flemish Regulator for the Media ("*Vlaamse Regulator voor de Media*" or "VRM") (Flanders); the Council for the Media ("*Conseil Supérieur de l'Audiovisuel*" or "CSA") (Wallonia); and the Council for the Media ("*Medienrat*") (German-speaking community). In the bilingual Brussels-Capital Region, however, audio-visual media services are regulated on a federal level with the BIPT as regulator. Through a co-operation agreement of 2006, the federal government and the different communities established a central body for oversight and co-operation, the Conference of Regulators for the electronic Communications sector (CRC).

Each community has enacted a general decree for the regulation of media and content. In Flanders, the Decree of 27 March 2009 on radio and television broadcasting regulates the provision of audio-visual media services. In Wallonia, this is regulated by the Decree of 26 March 2009 on audio-visual media services. In the German-speaking community, the Decree of 27 June 2005 on radio broadcasting and film screenings is in place. These decrees have been subsequently amended, mainly to implement the provisions of the Audio-visual Media Services Directive 2010/13/EU of the EU. The new federal Act of 5 May 2017 on audio-visual media services in the bilingual Brussels-Capital Region regulates the provision of media services in the Brussels-Capital Region.

1.2 Government Ministries, Regulatory Agencies and Privatised Entities

The Telecom Media Technology (TMT) industries are co-ordinated, regulated and monitored by different public entities, both on a federal level regarding electronic communications, and on a community level regarding audio-visual media.

The telecommunications sector is regulated on a federal level pursuant to legislation adopted by the federal legislator. Federal ministers in charge of policy-making are:

- Alexander De Croo, Minister of Digital Agenda, Telecom and Post;
- Kris Peeters, Minister of Work, Economy and Consumers;
- Philippe De Backer, Secretary of State in charge of Privacy and Data Protection.

The competent regulatory authority for electronic communications is the Belgian Institute for Postal services and Telecommunications (BIPT). The organisation functions independently under its own statute. The BIPT regulates the market by adopting decisions, opinions and studies, by monitoring compliance and imposing administrative sanctions, and by acting as an ombudsman in disputes between users and electronic communication companies. With the new Act of 31 July 2017 pertaining to various provisions regarding electronic communications, the BIPT was given the authority to make binding administrative decisions in disputes between electronic communications operators. After a request for dispute resolution, the BIPT must make a decision within four months.

Apart from this, the BIPT is also charged with the administration and allocation of scarce resources, such as the electromagnetic spectrum, radio frequencies and numbers. It also serves as the audio-visual media regulator for the bilingual Brussels-Capital Region.

The Commission for the Protection of Privacy (CPP) monitors compliance with privacy and data protection regulation and presents draft legislation regarding privacy and data protection in the electronic communications sector.

The audio-visual media sector is regulated on a community level pursuant to legislation adopted by the community legislators of Flanders, Wallonia and the German-speaking community. However, media distribution and content is regulated on a federal level in the bilingual Brussels-Capital Region. In each community, a competent regulator is charged with co-ordinating, regulating and monitoring the audio-visual media sector. In Flanders, this is the Flemish Regulator for the Media (VRM); in Wallonia, this is the Council for the Media (CSA); and in the German-speaking community, this is the Council for the Media (*Medienrat*). The BIPT regulates the audio-visual media industry of the Brussels-Capital Region.

In 2006, the Conference of Regulators for the electronic Communications sector (CRC) was established. This overarching body brings together the BIPT and the community regulators on audio-visual media (VRM, CSA and *Medienrat*) in order to adopt decisions in matters of coinciding competencies, such as the transmission of broadcasting signals. The Belgian Competition Authority deals with all matters related to competition law in the TMT industries, such as cartels, abuses of dominance, mergers, state aid, etc.

1.3 Developing Rules and Adopting Policies

TMT industries are regulated in Belgium on a European, federal and community level. Policies for electronic communications networks and services are generally developed within the framework of the EU (digital) single market strategy of the European Commission. National law reflects these policies through the implementation of EU directives or through the application of its regulations. This is also the case for audio-visual media services, where the different communities have adopted television and broadcasting decrees pursuant to the EU Audiovisual Media Services Directive.

On the federal level, policies are generally developed by the minister of Digital Agenda, Telecom and Post and by the relevant regulatory authorities. The minister and the regulators will propose draft legislation which must be adopted into law by the federal or community legislators, respectively, to have legal effect. Royal decrees will often further determine procedures, modalities and implementations of federal legislation.

The BIPT and community media regulators apply the regulation in practice through the adoption of decisions, opinions, market evaluations, etc. They monitor compliance with the regulatory framework and co-operate with European instances to further develop policies for the TMT industries.

1.4 Ownership of Telecoms Media Technology Industries

The Belgian Act of 21 March 1991 on the reform of some economic public companies reformed the Belgian telecommunications market and created a new form of state-owned company. The incumbent telecommunications operator, Belgacom (now Proximus), was established as an autonomous public company in which the Belgian government retains a majority share. Consequently, the incumbent operator in Belgium is not fully privatised. However, different policy-makers, such as the minister of Digital Agenda, Telecom and Post, Alexander De Croo, have recently suggested further privatising Proximus. All other competitors on the telecommunications market are privately owned.

The audio-visual media industry consists of both private and public radio and television broadcasters. There are three public broadcasters in Belgium, one for every linguistic community. *Vlaamse Radio- en Televisieomroeporganisatie* (VRT) is the public broadcaster in Flanders, *Radio-Télévision belge de la Communauté française* (RTBF) is the public broadcaster in Wallonia, and *Belgischer Rundfunk* (BRF) is the public broadcaster for the German-speaking community. Each public broadcaster is organised as an autonomous public company in which the respective community is the sole shareholder.

1.5 Limits on Participation

Since the liberalisation of 1 January 1998, the telecommunications sector in Belgium is fully open to competition. No limits on participation are in place. Electronic communications operators are only subject to general authorisation conditions and a notification duty to the BIPT, based on the payment of an administrative fee. However, an operator still needs an individual licence for the use of electromagnetic spectrum, radio frequencies and numbers.

Market entrants are generally able to enter the market without the need to significantly invest in their own network infrastructure through wholesale access and interconnection regulation.

With regard to television broadcasting, several cable network operators enjoyed a monopoly position in the respective regions of their infrastructure. In 2011, a decision by the CRC required Telenet, Brutélé, Tecteo and Numericable to open up their cable networks to competitors. After more than three years of legal proceedings, the Brussels court of appeal confirmed the decision by the CRC to liberalise the market by providing wholesale access to the cable networks. This allowed Orange (previously Mobistar) to start offering cable television and internet services.

1.6 Restrictions on Foreign Ownership or Investment

There are no restrictions on foreign ownership or investment in the TMT industries. Electronic communications operators meeting the notification and general authorisation requirements are allowed to provide their services in Belgium

1.7 World Trade Organization Membership

Belgium has been a member of the World Trade Organization (WTO) since 1 January 1995. As a member state of the European Union, Belgium has made commitments under the General Agreement on Trade in Services (GATS) regarding telecommunication services. These commitments were made by the European Communities (now EU) and their member states in both the Uruguay Round (GATS/SC/31) and as annex to the Fourth Protocol on Basic Telecommunications (GATS/SC/31/Suppl.3). However, no specific commitments were made concerning audio-visual services.

Under the European Union, Belgium commits to the complete liberalisation of the telecommunications market, including satellite services and mobile and personal communication services. Belgium also commits to the WTO Reference Paper on regulatory principles for telecommunications services. Belgium has shown improvements towards these commitments by removing the 49% foreign equity restriction. Belgium has made a reservation by providing that licensing conditions may address the need to guarantee universal service, including through financing, in a transparent, non-discriminatory and competitively neutral manner and will not be more burdensome than necessary. There are no scheduled exemptions regarding telecommunications services.

1.8 Appellate Process

The Act of 17 January 2003 on remedies and dispute resolution concerning the Belgian Institute for Postal Services and Telecommunications provides that decisions by the BIPT can be appealed at the Market Court, a section of the Brussels court of appeal. Every person with an interest can file an appeal, which is conducted using a fast-track procedure. The appeal must be instituted within 60 days after the notification or publication of the decision. Any interested party may intervene in the appeal within 30 days of the publication of the petition for appeal on the website of the BIPT.

The introduction of appeal proceedings does not suspend the decisions of the BIPT. However, the appellant can request the full or partial suspension of the decision if there are serious grounds for the annulment of the decision and the indication of serious consequences which are difficult to remedy. Appeals before the Market Court can be based both on the merits of the decision, as well as on procedural or legal grounds. The judgment by the court of appeal may afterwards still be appealed before the supreme court (Court

of Cassation). The Court of Cassation will not examine the judgment based on the merits of the case, but will confirm or annul the judgment based on legal or procedural grounds.

Decisions by the CRC can be appealed to the Brussels court of appeal. The Cooperation Agreement of 17 November 2006 provides that the interested parties have 60 days to file for appeal from the day the contested decision is notified to them by registered letter. Unless the court decides otherwise, the appeal has no suspensive effect. The Brussels court of appeal notifies all interested parties of the existence of the appeal.

Decisions by the audio-visual regulators in the different communities (VRM, CSA, Medienrat) may be appealed to the Council of State. This highest administrative court will examine the legality of the decision in relation to superior rules of law. It will afterwards either confirm, suspend or annul the contested decision.

1.9 Annual or Recurring Fees

The BIPT assigns user rights for radio frequency spectrum partly or entirely used for public electronic communications services. Article 30 of the Electronic Communications Act provides that the allocation of frequencies may be subject to the payment of fees in order to ensure the optimal use of spectrum. Several royal decrees establish the terms for obtaining and exploiting the spectrum licences in the respective frequency bands. This includes the amount and the timing of payment of the fees. Spectrum licences are generally allocated on the basis of an auction, which is usually the case for mobile communication services, or on the basis of general selection criteria.

Applicants must first pay a filing fee which serves to cover the costs of the examination of the file. Licence fees for spectrum used for mobile communications services are laid down in different royal decrees depending on the type of spectrum used. Licence fees are generally based on the amount of MHz used within a specific spectrum and the period of validity of the license. In case of an auction, this basis is used to set the minimum bid.

Apart from this one-off licence fee, the licensee must pay an annual fee for the allocation of the frequencies. This annual fee is split up into an annual management fee and an annual allocation fee. The annual management fee is a fixed fee which represents the administrative costs for the management of the spectrum by the BIPT. The annual allocation fee is a variable fee which depends on the amount of MHz used in a specific frequency spectrum. The annual fee serves to encourage operators to use the allocated frequencies optimally and make them profitable.

2. Broadcasting/Media

2.1 Important Companies

The most important companies in broadcasting / media are:

- Public broadcasters – VRT and RTBF;
- Non-public broadcasters and media companies – Media-laan, De Vijver Media, RTL Belgium;
- Written press – Mediahuis (JV between Corelio and Con-centra), De Persgroep.

Norkring Belgium is a leader in transmission and broadcast infrastructure in Flanders and Brussels. Distributors such as Proximus, Telenet, Nethys/Brutélé also provide their own content or have important shares in broadcasters and media companies.

2.2 Requirements for Obtaining a Licence/Authorisation to Provide Services

Broadcasting and media are regulated at the level of the three communities – Dutch-speaking, French-speaking and German-speaking – save for the French/Dutch bilingual region of Brussels-Capital where the federal institutions remain competent.

The Dutch-Speaking Community

VRT is the public broadcaster for both radio and television. Among private linear radio broadcasters, the Dutch-speaking community distinguishes between national, regional, local, network and other broadcasting organisations. All private linear radio broadcasters require (i) authorisation from the Flemish government to use blocks of frequency or frequency channels, and (ii) a broadcasting licence from the Flemish Regulator for the Media (“*Vlaamse Regulator voor de Media*” or “VRM”).

For television, the Dutch-speaking community makes a distinction between private broadcasters and regional broadcasters. Private broadcasters must simply notify VRM, whereas regional broadcasters require an actual licence from VRM. Television broadcasters will negotiate the transmission of the television signal with service-providers, having a broadcasting licence or operating a cable network.

Mid-2017, the Flemish government organised its latest round for spectrum allocation. Applications for frequency blocks and channels must be in Dutch and be submitted by registered letter within a set deadline. During the latest round, an application could be submitted within 30 days following the official announcement. Applications are put to a comparative test. Licences are normally granted within 120 days following the official announcement. Following the recognition of local and network radio broadcasters, the Flemish government allowed almost six months for VRM to process requests for broadcasting licences.

Broadcasters must pay a yearly fee for their frequency licence. The licence fee amounts to the sum of (i) EUR250 per broadcasting post in use, (ii) 2% of the gross revenue between the indexed amount of EUR12 million and EUR20 million, and (iii) 5% of gross revenue above EUR20 million. The corresponding broadcasting licence is granted free of charge. Changes to a broadcasting licence cost EUR250.

The French-Speaking Community

The public broadcaster, RTBF, offers both radio and television services. As for private radio broadcasters, the French-speaking community distinguishes between independent radio and network radio. Radio broadcasting licences and spectrum are allocated in a tender process following periodical public requests for proposals. Licences are granted by the competent division of the Council for the Media (“*Conseil Supérieur de l’Audiovisuel*” or “CSA”) within three months following the final submission date for proposals. Licences for independent radio broadcasters cost between EUR762.33 and EUR1,588.20 per year per allocated radio frequency. Licences for network radios can cost up to EUR63,527.82 (indexed amounts). Specific provisions apply to broadcasters of school radio, digital radio and radio with a permanent cultural or education purpose, which may be offered free of charge if certain conditions are met.

As for non-public television broadcasters, the French-speaking community distinguishes between private television broadcasters and local television broadcasters, offering a public service. Private television broadcasters must submit a declaration form the method of transmission, etc. Private television broadcasters must contribute to the production of audio-visual works. Any change in the information submitted to CSA must be notified in advance.

Local television broadcasters must obtain a licence from the government of the French-speaking community. Requests must be submitted with the CSA, and are handled within six months. The request must describe the public character of the services offered.

If no spectrum is used for offering distribution services, private entities wishing to offer such services must notify CSA. The use of spectrum for distribution services requires prior authorisation by CSA.

The Bilingual Region of Brussels-Capital

Since June 2017 a licence is no longer required for the provision of audio-visual media services in this part of the country. There is merely a duty to notify BIPT.

With respect to spectrum allocation, the available spectrum has been taken up by the Dutch and French-speaking communities. There is no separate frequency plan for the Region of Brussels-Capital, and, according to the Belgian legislator,

there is currently no need to regulate radio services in this locality.

The German-Speaking Community

In the German-speaking Community, BRF is the public broadcaster offering radio and television services. Private radio and television broadcasters must provide notification to the Council for the Media (“*Medienrat*”). A licence is only needed for transmission via the frequency spectrum. Requests for spectrum licences cost EUR130.75 (indexed amount), and are handled within approximately six weeks. Specific rules apply to network radio, local radio broadcasters

2.3 Typical Term for a Licence/Authorisation to Provide Services

In the Dutch-speaking community, spectrum licences (and the corresponding broadcasting licences) for a specific frequency band are granted for a 15-year term, renewable once. A renewal must be requested one year prior to the lapse of the licence. VRM analyses the renewal request according to the same criteria as the initial request, and issues a decision within 60 days following the request.

In the French-speaking community, spectrum licences and private radio broadcasting licenses are granted for a nine-year term, which is renewable. School radio licences are attributed for two-year periods, also renewable.

Licences for local television services are granted for a renewable term of nine years. The same criteria apply as for the initial request.

Licences in the German-speaking community have a nine-year term.

2.4 Transfer of Licences/Authorisations to Other Entities

Spectrum licences and the corresponding broadcasting licences in the Dutch-speaking community are personal. They can only be transferred to a third party upon written approval from VRM.

In the French-speaking community, radio broadcasting licences are non-transferable. However, CSA may authorise the merger of radio broadcasters or the exchange of radio frequencies between broadcasters having licences in the same zone. Within one month following the request for merger or exchange of frequencies, CSA must publish its opinion in the Belgian Official Journal. Anyone who has an interest in the merger or exchange of frequencies may file opposition to the request within a month of publication of CSA's opinion.

Broadcasting licences in the German-speaking community are non-transferable.

2.5 Spectrum Allocated

FM radio operates in the frequency band between 87.5 MHz and 108.00 MHz; T-DAB and DVB-T operate in the following frequency bands: 174-216 MHz, 223-226.5 MHz, 470-780 MHz, and 614-684 MHz.

2.6 Restrictions on Common Ownership

Mergers, acquisitions and joint ventures between broadcasting, media and other TMT companies are subject to the approval of the Belgian or European competition authorities. Which competition authority is competent depends on the size of the undertaking. The competition authorities will focus mainly on an economic analysis of the market to assess the risk of monopolies or abuse of power. In addition, the Belgian competition authority has ordered measures to protect the quality and diversity of media services when authorising a transaction, but making the acquisition conditional upon the commitment to keep existing newspapers on the market under the direction of their own editorial commitments.

The media regulators of the different language communities may also impose measures to prevent abuse of dominance by companies with substantial market power.

2.7 Content Requirements and Regulations

While freedom of expression is a core principle, specific limitations apply to broadcasting and advertising.

Broadcasting content limitations are set by the different language communities. The different language communities have similar rules to protect minors, banning the linear broadcasting of content that could seriously affect the physical, mental or moral development of minors. Television programmes including pornographic scenes or gratuitous violence may be distributed via non-linear services only, provided that adequate measures are in place (such as technical measures or the timing of broadcasting) to prevent access by minors.

Public television broadcasters and private linear television broadcasters (with the exception of regional and teleshopping broadcasters) must strive to reserve the majority of their transmission time which is not dedicated to news, sports, game shows, advertising, teletext or teleshopping to European productions. A considerable portion must be used for productions in the local language of the community in question.

Both federal and community rules apply to advertising. Federal legislation prohibits the advertising of tobacco products, regulates the advertising of alcohol, medicines and medical

treatments, online advertising and prohibits unfair commercial practices. Similar limits apply to advertising and product placement across the different language communities. The communities seek to preserve the integrity and value of television programmes by imposing limits as to the timing of advertising. Both the Dutch and the French-speaking language community prohibit the promotion of discriminatory and harmful behaviour, as well as the promotion of alcoholic beverages during advertising breaks preceding or following children's programmes. Stricter rules apply to advertising by the communities' public broadcasters.

2.8 Difference in Regulations Applicable to Broadcasting Versus Cable

Different capacity allocation regimes apply to broadcasting via the frequency spectrum versus broadcasting via other distribution paths. The Media Decree of the Dutch-speaking community sets limitations for use of digital capacity on frequency spectrums by service-providers. All language communities distinguish between linear and non-linear services, offering a lighter regulatory framework for the provision of non-linear services, such as video-on-demand.

2.9 Transition from Analogue to Digital Broadcasting

Since November 2008, the Dutch-speaking community switched to digital television broadcasting. When allocating digital frequency packages in 2009, the Flemish government required that the licence-holder offer digital radio and television services capable of being received on fixed and mobile receivers. The broadcasting licences of national network radios were extended upon the condition they will broadcast via DAB+ by 1 September 2018. The Flemish government expects to complete the transition to DAB+ by 2022.

The French-speaking community completed the switch from analogue to digital television broadcasting on 30 November 2011. The Wallonia government authorised DAB+ trials in 2012, and expects to launch DAB+ for public radio in 2018.

2.10 Extent to Which Local Government Regulation is Pre-Empted

The Communities in Belgium are competent for the regulation of broadcasting and media services. The Flemish Regulator for the Media ("*Vlaamse Regulator voor de Media*" or "VRM") is the competent regulator in the Dutch-speaking community. In the French-speaking community, the competent regulator is the Council for the Media ("*Conseil Supérieur de l'Audiovisuel*" or "CSA"). The Council for the Media ("*Medienrat*") is the regulator in the German-speaking community. In the bilingual Region of Brussels-Capital, the federal level remains competent by means of BIPT.

3. Telecoms

3.1 Important Companies

The most important companies for the general electronic communications market, by turnover and market share in 2016, are:

- Proximus – EUR4,477,324,615 (49% market share);
- Telenet – EUR1,849,902,278 (22% market share);
- Orange Belgium – EUR1,161,958,633 (14% market share);
- Telenet Group (formerly Base) – EUR647,846,222 (7.4% market share).

3.2 Requirements for Obtaining a Licence/Authorisation to Provide Services

Access to the electronic communications market in Belgium is free. The provision of electronic communications services or the operation of electronic communications networks does not require an individual licence or authorisation by the regulatory authority or the government. Article 3 of the Electronic Communications Act provides that the provision of electronic communications services is free, subject to the conditions determined by law.

An electronic communications service is defined in the Electronic Communications Act as "a service, normally provided for remuneration, which consists wholly or mainly of the transmission of signals on electronic communications networks, with the exception of services which are used for the provision of or to exercise editorial control over content, information society services, and radio and television broadcasting services".

A newcomer in the market can start its activities when he complies with the general conditions imposed by the Electronic Communications Act, which implements the provisions of the EU Authorisation Directive 2002/20/EC. The general conditions relate to interoperability of services and interconnection of networks, financial contributions for funding universal service, must carry obligations, data protection, number portability, user rights, etc.

A precondition for the start of the electronic communications activities is, however, a notification to the BIPT. The provision or resale (on own behalf or for own use) of electronic communications services or networks can only start after this notification to the BIPT, which is subject to the payment of a filing fee (EUR703). The notification takes effect from the day it is sent to the BIPT and results in an obligation for the electronic communications service-provider to pay a yearly administrative fee which scales significantly in relation to its yearly revenue (between EUR657 and EUR193,005). The newcomer is then granted the operator's status.

As a result, an operator can start providing electronic communications services from the moment he sends the notification to the BIPT, pays the filing fee and complies with the general conditions of the electronic communications regulatory framework.

Operators complying with the regulatory obligations to provide electronic communications services obtain the right to negotiate access agreements with other authorised operators in the entire European Union, to request the construction of facilities and to be designated to provide a universal service in Belgium.

However, the right to use scarce electronic communications resources, such as radio frequency spectrum and numbers, does require the granting of an individual licence and the payment of fees to the BIPT (see **1.9: Annual or Recurring Fees** above).

3.3 Transfer of Telecoms Licences/Authorisations to Other Entities

There are no individual licences or authorisations for the provision of electronic communications services in Belgium, only a notification duty and an obligation to comply with the general authorisation conditions. When the notified information of the operator changes due to merger or changes in ultimate ownership, the operator is required to notify the BIPT of these changes and amend its information. A similar notification has to be made if the notified operations cease to exist due to the merger.

3.4 Regulations for Network-to-Network Interconnection and Access

After notification to the BIPT, an operator receives a standardised declaration informing him of his right to negotiate and obtain access. An authorised operator in another member state of the European Union looking to start activities in Belgium may already negotiate access and interconnection agreements, even before a notification to the BIPT.

Concerning network-to-network interconnection, all network operators are required to negotiate interconnection agreements with every requesting operator in good faith. Good faith negotiations are evaluated on a case by case basis and must at least include a response to the request by the network operator and an exchange of propositions which meet the minimal technical and financial conditions set out in the Royal Decree of 1999 on commercial negotiations regarding interconnection agreements and interconnection reference offers.

If the parties fail to negotiate in good faith an interconnection agreement, they can request the BIPT to mediate in a voluntary conciliation procedure. The BIPT will attempt to reconcile the parties within one month.

More importantly, Article 51 of the Electronic Communications Act provides that the BIPT also has the competence to intervene in both access and interconnection negotiations in order to assure adequate access or interoperability, to promote sustainable competition and user interests and to contribute to the development of an electronic communications single market. The BIPT can intervene either at its own initiative or on the request of one of the parties. The BIPT may, *inter alia*, impose deadlines for the completion of the negotiations or determine guiding principles for access or interoperability. The BIPT may also impose all necessary obligations on operators controlling access to end-users to ensure end-to-end connectivity and interoperability of services.

The BIPT may also, following the market analysis procedure of Article 55 of the Electronic Communications Act, impose *ex ante* regulatory obligations regarding access and interconnection on operators found to have significant market power (SMP) status in a specific market. When one or several operators are found to have SMP in a relevant market, the BIPT is required to impose remedies. Apart from transparency, non-discrimination and accounting obligations, the BIPT may require the SMP operator to provide and respect a reference offer for access or interconnection, to give third parties unbundled access to the local loop, to interconnect networks, to apply cost-oriented regulated tariffs, etc.

For example, in 2011, the CRC imposed wholesale access obligations on Telenet, Brutélé, Tecteo and Numericable because of their regional monopoly position as cable network operators. The cable network operators were imposed obligations regarding access, non-discrimination, accounting separation, price control and cost-orientation. The obligations included the provision and publication of a reference offer for the resale of analogue television and the provision of wholesale access to the digital television platform. After serious opposition by the cable network operators, the Brussels court of appeal confirmed the CRC decision in November 2014.

3.5 Accounting, Functional and Legal Separation

The BIPT can, for all activities related to access, impose an accounting separation obligation on an operator with significant market power. The BIPT may, in particular, require a vertically integrated operator to make transparent its internal wholesale prices and transfer prices in order to, *inter alia*, ensure compliance with provided obligations of non-discrimination or to prevent unlawful cross-subsidisation. The BIPT may also require the electronic communications operator to provide all relevant accounting records. In the markets where Proximus, the incumbent operator, was found to have significant market power (access to the public telephone network at a fixed location, call origination on the public telephone network provided at a fixed loca-

tion, wholesale physical access at a fixed location, wholesale broadband access, leased lines segment termination, and call termination on individual mobile networks) an accounting separation has been imposed. Telenet, Brut  l  , Tecteo and Numericable were also imposed an accounting separation obligation in relation to wholesale broadband access on their digital television platform.

If the BIPT determines that the imposed obligations relating to transparency, non-discrimination, accounting separation, access, price control and cost accounting failed to resolve competition issues on the relevant market, it can impose, as an exceptional measure, an obligation on a vertically integrated SMP operator to place activities related to the wholesale provision of relevant access products in an independently operating business entity (Article 65/1, Electronic Communications Act). The BIPT is required to file a request for the functional separation obligation with the European Commission. The imposition of the obligation depends on the authorisation of the European Commission. The separated business entity is then required to supply access to products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

No measures of functional separation have been imposed on the Belgian electronic communications market to date.

Article 65/2 of the Electronic Communications Acts provides that operators possessing significant market power have the possibility voluntarily to perform a functional or legal separation of their local access network or retail operations. For this, operators are required to notify the BIPT of the transaction at least six months in advance. The BIPT will evaluate whether the notified separation requires the amendment, withdrawal or imposition of regulatory obligations.

Measures of legal separation are not provided in both the EU and the Belgian electronic communications regulatory framework.

3.6 Provisions for Access to Public and Private Land

The Act of 21 March 1991 prescribes the rules concerning access to public and private land for the installation of telecommunications infrastructure and equipment.

Article 97 of the Act of 21 March 1991 provides that an operator of a public electronic communications network has the right to access and use public land and private property to install telecommunications infrastructure, provided that it respects their destination and the legal and regulatory

provisions governing their use. In order to access and use public land, the operator needs approval of the development plan by the government responsible for the public land. Additionally, every operator of a public communications network has a right of way in the public domain, free of charge. For private property, the operator needs an agreement with the owner about the place and means of execution of the installation. If no agreement is reached, the operator must provide the property owner with a detailed description of the intended place and means of execution. The owner then has eight days to file an objection with the BIPT, which has suspensory effect.

3.7 Rules Which Govern the Use of Telephone Numbers

The BIPT is charged with managing the national numbering plans pursuant to the Royal Decree of 27 April 2007 on the management of the national numbering space and the granting and repeal of user rights. The BIPT is required to allocate licences for number capacity in a transparent and non-discriminatory manner in order to ensure equal access to adequate number series for each operator. The operator requesting the reservation of number capacity must pay a filing fee and must take into account specific filing conditions. The BIPT decides on the application within a period of three weeks. Licences are granted on a "first-come, first-served" basis. However, for numbers of exceptional economic value the BIPT may decide to organise a selection procedure based on an auction. Afterwards, the operator is required to pay an annual licence fee depending on the capacity and type of number. The BIPT monitors the use of number capacity to ensure non-discrimination for number sequences used to provide access to services.

Electronic communications operators are required to provide access to emergency numbers free of charge. They must bear the costs of access, transmission and use of the network for calls made by their end-users to emergency numbers. Additionally, operators are also required to provide the emergency services with the identification data of the caller.

Article 11 of the Electronic Communications Act provides that number portability is an obligatory facility which must be provided by all operators which have been assigned telephone numbers from the national numbering plan. The transfer must be provided free of charge and the activation must take effect within one working day. Both mobile and fixed numbers are portable, although geographic numbers can only be transferred within the same number zone.

3.8 Regulation of Retail Tariff

The European regulatory principle for the electronic communications sector provides that "a retail market should only be subject to direct regulation if it is not effectively competitive despite the presence of appropriate wholesale regulation

on each of the related upstream market(s)". Following this principle, the BIPT does not impose regulated retail tariffs on electronic communications operators.

The EU Regulation 2015/2120 required operators to abolish retail roaming tariffs within the European Union as of 21 June 2017. Electronic communications operators are therefore no longer allowed to charge extra roaming costs next to national tariffs for the use of mobile services within the EU. The rules are, however, subject to exceptions to prevent abuse.

3.9 Rules to Promote Service in Underserved Areas

The Electronic Communications Act prescribes universal service obligations. The universal telecommunications service is composed of a geographic and social component and aims to provide a minimal set of electronic communications services to all end-users at an affordable price.

The fixed geographic component of the universal service consists of the provision throughout the Belgian territory, upon any reasonable request, of a basic fixed public voice telephony service and a fixed connection to a public electronic communications network enabling voice telephony, faxing, data transmission, and functional internet access with a minimum bit rate of 1Mbps. Additionally, the universal service-provider must establish a technical helpdesk and ensure that subscribers which default on the payment of their telephone bills are still able to receive telephone calls and call emergency services.

Until August 2013, Proximus, the incumbent operator, was designated as the universal service-provider responsible for the geographic component. Since then, no universal service-provider has been designated for this component. Compensation for the provision of this universal service is only possible in as far as it constitutes an unfair burden on the provider. Cost-based compensation is provided out of the "universal service fund". The fund is financed through contributions by the other electronic communications operators in relation to their retail revenue for the provision of public telephony services on the Belgian territory.

The social component of the universal service consists of the provision of social tariffs to certain categories of persons when providing fixed telephony, mobile telephony or internet access services. Hearing impaired persons, blind war veterans, persons with an integration income, persons with a disability of at least 66% and elderly people who are at least 65 years old are entitled to these social tariffs.

All electronic communications operators with an annual turnover exceeding EUR50 million are required to offer social tariffs for fixed telephony, mobile telephony and internet access services. Operators with a turnover lower than

or equal to EUR50 million can still declare to voluntarily provide these social tariffs. Compensation for the provision of these social tariffs is only possible in as far as it constitutes an unfair burden. For this reason, a separate "universal service fund concerning social tariffs" financed by all operators providing the social component of the universal service is established. Contributions are calculated in relation to their annual revenue for the provision of public electronic communication services.

The Belgian Constitutional Court decided on 3 February 2016, following a preliminary ruling by the European Court of Justice, that mobile telephony and mobile Internet are considered to be additional mandatory services. However, while mobile telephony and internet providers can be required to apply social tariffs, they cannot rely on the universal service fund to receive compensation.

3.10 Extent to Which Local Government Regulations of Telecom Service is Pre-Empted

Electronic communications networks and services in Belgium are governed by a federal regulatory framework under the Electronic Communications Act of 13 June 2005. This regulatory framework is regulated by a single regulator, the BIPT.

4. Wireless

4.1 Important Companies

The leading companies in wireless communication, in order of turnover of 2016, are:

- Proximus (EUR1,478,391,031);
- Orange (EUR826,081,987);
- Telenet Group (formerly Base) (EUR750,946,834).

All three are mobile network operators (MNOs).

The market share of mobile virtual network operators (MVNOs) has been fast growing. In 2016 MVNOs accounted for a 16.1% market share (EUR586,218,975). The largest MVNO is Telenet with a 9% market share. As a result of the EC's clearance of Telenet's acquisition of Base in 2016, Telenet will transition into a MNO. Pending this transition, Telenet and Telenet Group operate under different entities, and they are still considered as two separate operators. The transition is expected to occur by the end of 2018. Lycamobile currently is the second largest MVNO with a 6% market share.

4.2 General Requirements for Obtaining a Licence/Authorisation to Provide Wireless Services

No licence is required for the provision of mobile/wireless telecom services (see 3.2: Requirements for Obtaining a

Licence/Authorisation to Provide Services above). Providers must however notify BIPT, setting out the services they intend to offer prior to the start of their activities. Mobile network operators (MNOs) need a licence from BIPT to use radio frequency bands for the provision of wireless services. Other service-providers and mobile virtual network operators (MVNOs) will use the spectrum allocated to MNOs.

4.3 Transfer of Wireless Licences/Authorisations to Provide Wireless Services

Radio frequency spectrum licences for public e-communication services may be transferred or leased as a whole or in part, subject to BIPT's approval. BIPT may refuse its approval if the transfer or lease (i) were to distort competition (which, for instance, may be the case when the original licence-holder acquired rights to use the spectrum free of charge), or (ii) impedes the effective and efficient use of the radio frequency spectrum.

In the case of a transfer, the acquirer must continue to fulfil the original licence conditions. When leasing wireless licences, the lessor remains responsible for compliance with the licence conditions.

The prospective licensor/lessor must notify BIPT. The notification must include a copy of the transfer/lease agreement and be accompanied by an administrative fee to cover for BIPT's costs of examining the request. BIPT may request additional information on the transaction within six weeks. BIPT's decision to approve or deny the transfer or lease must be given within three months following the notification or following the receipt of additional information. The termination of a temporary transfer or lease must also be notified to BIPT. The transfer, lease and its termination will be made public on BIPT's website.

A change of control of the licence-holder also requires prior notification. The licence may be revoked in case the change of control seriously compromises the conditions under which the licence was issued.

4.4 Spectrum Allocation

The following spectrum is allocated to mobile wireless services:

- 700 MHz (790-862 MHz)
- 800 MHz (880-915 MHz)
- 900 MHz (925-960 MHz)
- 1700 MHz (1710-1785 MHz)
- 1800 MHz (1805-1880 MHz)
- 1900 MHz (1920-1980 MHz)
- 2100 MHz (2110-2170 MHz)
- 2500 MHz (2500-2570 MHz)
- 2600 MHz (2620-2690 MHz)
- 3400 MHz (3410-3500 MHz)

- 3500 MHz (3510-3600 MHz)

Full details of the allocations of spectrum to wireless service are provided in the national frequency allocation table, available at <http://www.bipt.be/en/operators/radio>.

4.5 Procedures to Identify and Assign Spectrum Among Competitors

The assignment of spectrum varies depending on the frequency and its intended use. The conditions for obtaining spectrum licences, as well as its permitted use, are laid down in royal decrees. For mobile services, BIPT generally assigns spectrum using both auctions and comparative selection processes. Auctions have been favoured for the assignment of spectrum for more recent mobile applications – for example, auctions were used in 2001 and 2011 for the assignment of spectrum for the provision of 3G services and in 2010, 2011, 2013 and 2015 for the assignment of spectrum destined for 4G services. New spectrum auctions are expected in the near future for the development of a 5G framework in Belgium.

Requests for private e-communication services are examined and allocated on a “first-come, first-served” basis, depending on their necessity and availability.

4.6 Unlicensed Spectrum Uses

No notification or licence is required for the provision or resale of electronic communications services or networks which are not in the public domain. As such, a Wi-Fi connection at home requires no notification or licence. The same applies for Wi-Fi offered in bars, hotels, shopping centres, taxis, etc. In practice, the Wi-Fi signal may be reachable from the public domain (eg, on the street). To be exempt from the notification requirement, the provider of the Wi-Fi service must ensure that the service cannot be used freely from the public domain (eg, by adapting the power of the Wi-Fi router or by setting a password and changing it regularly).

A notification or licence is also not required for the provision or resale of electronic communications services or networks which are intended exclusively for a legal person, in which the provider or reseller has a majority share, or intended for natural or legal persons within the framework of an agreement according to which electronic communications services or networks are made available secondarily and only by way of assistance. One can think of e-communication services within a financial group, university networks, etc.

For other uses of a radio communication device, a written authorisation from BIPT is needed. BIPT may seize transmitting devices that make unauthorised use of allocated spectrum or if they disrupt radars, such as the one used by the Royal Meteorological Institute of Belgium or the army.

Certain types of walkie-talkies and wireless microphones are licence-exempt.

4.7 Government Policy/Regulation to Promote Next Generation Mobile Services

The Belgium government attached coverage obligations to the allocation of spectrum below 1GHz. In 2016, Belgium reached an average 4G coverage among operators of 95%.

In 2017, BIPT granted extensions to existing spectrum licences, coupled with capacity requirements. These capacity requirements aimed at strengthening the national broadband strategy and at deploying 5G networks. The operator in question recently relinquished its licence rights. In any event, the Belgian government expressed the intention to support 5G initiatives and to increase mobile coverage further.

4.8 Price Regulation for Mobile Services

SMP operators (ie, operators with significant market power) are subject to price regulation. At a wholesale level, mobile termination rates are regulated on the basis of a Bottom-Up Long Run Incremental (BU-LRIC) cost model. The same maximum tariffs apply to MNOs, full MVNOs and OTT-VoIP operators. Mandatory sharing and reasonable, fair and non-discriminatory usage fees for antenna sites are regulated by statute.

At a retail level, maximum tariffs apply for porting a number and for the provision of paid services via e-communication networks. In addition, operators with a turnover of more than EUR50 million are obliged to offer social tariffs to low income households, elderly people with a low taxable income, categories of handicapped people, etc.

Intra-EU roaming charges have been abolished since 15 June 2017 within the data limits of one's subscription. The maximum charges for additional roaming within the EU are set at EUR7.7 per GB until 1 January 2018. Between 2018 and 2022 these maximum charges will gradually decrease from EUR6 to EUR2.5 per GB.

4.9 Regulation of Government and Commercial Wireless Uses

Part of the spectrum is allocated to the Ministry of Defence, and priority is given to communication by public emergency and security agencies.

4.10 Extent to Which Local Government Regulation of Wireless Service is Pre-Empted

Electronic communications networks and services are regulated by a single regulator, BIPT, operating under a single legislative scheme that applies throughout Belgium.

5. Satellite

5.1 Important Changes

In Belgium, the most important companies in the satellite industry are Intelsat, Eutelsat, and SES Astra.

5.2 General Requirements for Obtaining a Licence/Authorisation to Provide Satellite Service

As with other electronic communications services, the provision of satellite communication services (fixed or mobile) does not require an individual authorisation from the BIPT. Accordingly, the satellite communication service-provider has the obligation to file a notice with the BIPT before commencing its activities. The notice is subject to the payment of a filing fee (EUR703) and takes effect from the day it is sent to the BIPT. Afterwards, the satellite communication service-providers must pay a yearly administrative fee which increases significantly in relation to the provider's revenue (between EUR657 and EUR193,000).

As the provision of satellite services implies the launching of a satellite, the transmission of signals and the use of frequencies, the relevant operators need different kinds of authorisations/licences.

The launch into orbit of a satellite from the Belgian territory requires a specific authorisation by the competent minister. This authorisation may also be required for Belgian nationals outside the Belgian territory if an international treaty so determines. The authorisation, which is governed by the Belgian Act of 17 September 2005 and the Royal Decree of 19 March 2008, is necessary for all activities regarding the launch, flight operation, or guidance of a space object, which includes satellites. The applicant must pay an administrative filing fee of EUR1,000 (excluding potential costs of expert review). The grant of an authorisation depends on warranties regarding safety, environment and financial insurance.

Second, the operators of satellite ground station facilities require a written licence from the BIPT to carry out their operations. These facilities may serve as a telecommunications port to connect satellites with terrestrial telecom networks. The application for this licence is subject to the payment of a one-off application fee, which differs depending on the need for frequency co-ordination. In addition, an annual fee is charged, which varies in relation to the frequency and bandwidth used.

Third, the licensed operator of a satellite network must apply for an allocation of frequencies in which to transmit. The request is considered by the BIPT, which will act in accordance with the applicable ITU radio regulations for the allocation. The application for and grant of a right to use frequencies also implies the payment of an application fee and annual fee, which vary according to the type of frequency. The allo-

cation procedure and fee amounts are determined by Article 30 of the Electronic Communications Act and specific royal decrees. However, receiving satellites for radio broadcasting and satellite telephones require no licence by the BIPT.

5.3 Transfer of Satellite Licences/Authorisations to Other Entities

Regarding the authorisation for the launch and operation of a satellite into orbit, all transfers of the authorised activities, personal or property rights, which result in the loss of effective control over the space object, are forbidden, unless with specific prior approval by the competent minister as the Belgian Act of 17 September 2015 provides that the authorisation is personal and non-transferable.

Article 39 §1 of the Electronic Communications Act provides that the licence for operating a radio transmitting or receiving station, such as a satellite ground station, is personal. This implies that the “*intuitu personae*” licence cannot be transferred. Any change in ownership of the facilities is therefore subject to the grant of a new licence.

In contrast, rights to use allocated frequencies for the provision of satellite services can be transferred or leased to third parties. An operator wishing to transfer his rights is required to file a request for transfer with the BIPT. The Royal Decree of 26 February 2010 provides that, subject to the consent of the BIPT, an operator may transfer all or part of his rights to use allocated frequencies. The acquiring operator has the obligation to continue to fulfil the licensing conditions. The request is subject to the payment of a filing fee (EUR500). The BIPT must decide within three months of either the filing of the request or the receipt of the requested additional information.

5.4 Spectrum Allocation to Satellite Service

Satellite services are assigned to various frequency bands in Belgium’s frequency plan. Professional civil satellite services mostly operate in the 3600-4200 MHz and 5850-7075 MHz band for point-to-point transmission. Also, substantial use is made of the 10.5-14.5 GHz frequency bands. For more specific information on frequency allocation, consult Belgium’s frequency plan on <http://www.bipt.be/en/operators/radio>, navigating to the frequency management and frequency plan sections.

5.5 International Telecommunication Union Membership

Belgium is a member of the ITU. Belgium has made ITU satellite network filings.

5.6 Provision of Service by Foreign-Licensed Satellites

Foreign-licensed satellites are permitted to provide services in Belgium. There are no requirements regarding the need

for local earth station facilities or local companies. Apart from the notification obligations with the BIPT for the provision of electronic communications services in Belgium (see **5.2: General Requirements for Obtaining a Licence/Authorisation to Provide Satellite Service** above), there are no specific rules or obligations applicable to foreign satellite operators. This applies to operators located inside or outside the EU.

The provision of mobile satellite services (MSS) does, however, require an authorisation by the BIPT and the payment of a filing and annual frequency fee. The installation and use of complementary ground components by the authorised service-provider is subject to additional conditions for authorisation.

5.7 Milestone and Due Diligence Deadlines

Although there are no specific milestone or due diligence deadlines for the construction and launch of satellites, an operator who wishes to obtain an authorisation for its activity must go through an environmental impact assessment. Additionally, the minister can attach all specific conditions he sees fit to the provision of the authorisation. He can instruct the supporting committee of experts to perform inspection and monitoring activities and report to him about the current state of affairs of the project or activity. The minister may revoke or suspend an authorisation if he determines that the general or specific conditions are not complied with.

6. Internet/Broadband

6.1 Important Companies

The most important Internet / Broadband companies in Belgium, by market share in 2016, are:

- Proximus – 40-50%;
- Telenet – 40-50%;
- VOO – 0-10%.

6.2 Regulation of Voice-Over-IP Services

Voice-over-IP (VoIP) services are not specifically regulated in the Electronic Communications Act. However, as a result of the technological neutrality principle of the Act, VoIP services are also considered to be electronic communications services subject to Belgian telecommunications laws if they are provided against payment and consist completely or mainly of signal transmission over electronic communications networks. Although much debate still exists as to whether VoIP and other “over the top” (OTT) communications services fall under this definition, the BIPT maintains that the creation of a level playing field is necessary. OTT services providers compete with traditional electronic communications service-providers by offering content and communication services over the network of electronic com-

munications service-providers, without their control or involvement (see **6.6: Over-the-Top (OTT) Internet-Based Providers** below).

In this regard, the BIPT has imposed a fine of more than EUR220,000 on Skype for its failure to perform its notification duty as an electronic communications service-provider for its SkypeOut service. The BIPT argued that, as an interconnected VoIP service allowing calls to non-Skype fixed numbers, the SkypeOut service constitutes an electronic communications service which is subject to the relevant telecommunications laws. Although appeal against the decision is still pending, it is safe to say that VoIP services capable of Public Switched Telephone Network (PSTN) communication are regarded as electronic communications services in Belgium. As a result, the providers of such services are subject to rules regarding notification, data protection and retention, network security, access to emergency call services, etc.

The regulation of peer-to-peer VoIP services, where no connection to the PSTN is possible, is, however, still uncertain in Belgium (see section **6.6 Over-the-Top (OTT) Internet-Based Providers** below).

The introduction of the European Electronic Communications Code (ECC) in the near future will likely resolve this uncertainty. The proposed ECC will likely consider VoIP services as electronic communications services by including a new service category, interpersonal communications services (ICS), under its definition. This new service category will make the rules on electronic communications services applicable to VoIP services based on their functional equivalence. The proposed ECC makes an additional distinction between number-based ICS and number-independent ICS, the latter of which will be subject to lower regulatory requirements which serve the public interest, such as certain security obligations. The regulation of different VoIP services in Belgium will likely depend on this last distinction.

6.3 Interconnection and Access Regulatory Conditions to IP-Based Networks

Interconnection and access regulatory conditions are applied to IP-based networks in the same manner as to other electronic communications networks.

Operators of public IP-based networks must also negotiate interconnection agreements in good faith. The BIPT may likewise establish reasonable terms for interconnection when parties fail to negotiate in good faith. The BIPT also has the possibility to impose deadlines for the completion of the negotiations, or determine guiding principles for access or interoperability, when necessary to ensure appropriate access for end-users and guarantee end-to-end connectivity.

6.4 Net Neutrality Requirements

The Belgian Electronic Communications Act imposes certain obligations on internet service-providers (ISP) in relation to net neutrality. For example, an ISP is required to inform subscribers about traffic management procedures, download speed and volume, and legally permitted limitations to access or use of the internet access service.

Apart from these transparency obligations, net neutrality requirements in Belgium are governed by EU Regulation 2015/2120 (Net Neutrality Regulation). This regulation, which came into force on 30 April 2016, ensures that all traffic data on the Internet are treated equally, without discrimination as to its source, destination, device, or application. This means that, subject to specific exceptions, ISPs cannot block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services.

The BIPT is charged with monitoring the implementation of and compliance with the Net Neutrality Regulation. On 26 June 2017, the BIPT published its first annual report on the supervision of net neutrality in Belgium. It concluded that there are no major reasons for concern regarding open internet access in Belgium. The BIPT has also given particular attention to the practice of “zero-rating” by several ISPs and concluded that there were no reasons to intervene on the market.

6.5 Government Regulation of Internet/Broadband

In 2015 the Belgian minister of the Digital Agenda, Telecom and Post, Alexander De Croo, introduced the Digital Belgium Action Plan. The action plan establishes five long-term priorities for digital development in Belgium (infrastructure, safety, government, economy and employment).

Regarding infrastructure, a plan for ultra-fast internet in Belgium is presented, which aims to achieve internet speeds of up to 1 Gbps for at least half of the national connections by 2020, to facilitate the early establishment of mobile broadband technologies and introduce a proactive 5G framework. These milestones are to be achieved by implementing 17 specific measures in four areas of action. The plan pursues broadband coverage for all citizens and businesses through the collaboration between operators and authorities prior to the network roll-out, by utilising European financing instruments, stimulating Wi-Fi roll-out and imposing additional licensing conditions for the allocation of mobile frequencies in order to stimulate mobile broadband coverage. This last objective also requires the revision of taxes on the use of masts and pylons, and of radiation standards.

Measures will also be adopted to reduce the costs of building ultra-fast networks. These measures include the coordination of roadworks and distribution of costs between

the different network operators involved, the use of existing infrastructure, facilitating the assignment of licences, and assuring the “fibre readiness” of new building projects.

Recently, the Flemish minister of Work, Economy and Innovation, Philippe Muyters, announced plans to expand fibre networks in Flanders. The Flemish region currently consists of the cable network of Telenet and the copper and fibre network of Proximus. Muyters wants to negotiate with these existing providers to further expand their high-speed networks, provide access to all other providers and offer affordable tariffs to end-users. If both operators do not meet the terms of the negotiation, Muyters is planning on establishing a new public company in charge of the development of a new high-speed network in Flanders.

6.6 Over-the-Top Internet-Based Providers

There are no licensing requirements for OTT Internet-based providers. As mentioned above, the BIPT considers Internet-based OTT communication services capable of PSTN communication, such as SkypeOut, as electronic communications services subject to notification duty (see **6.2: Regulation of Voice-Over-IP Services** above).

Regulation of other OTT services is still uncertain. With the Skype decision, the BIPT has shown to adopt the view of BEREC, which makes a distinction between OTT services qualifying as or potentially competing with traditional electronic communications services and OTT services which do not potentially compete with these services. For the first category of OTT services, the BIPT clearly aims to introduce a more level playing field.

The proposed Directive establishing the European Electronic Communications Code will bring OTT services under the electronic communications regulatory framework. By amending the definition of electronic communications services to include interpersonal communications services, the scope of the electronic communications framework will be extended to functionally equivalent services. ICS are currently defined as services that enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and where interpersonal and interactive communication does not merely serve as a minor ancillary feature that is intrinsically linked to another service. In order to not unduly extend regulation to certain services, the proposed ECC differentiates between number-based ICS (eg, SkypeOut) and number-independent ICS (eg, WhatsApp). The first category will have to comply with stricter rules regarding transparency, switching and emergency calls. The number-independent OTT communications services will have to comply with more general pub-

lic interest rules, such as network security and rules related to access for disabled users.

6.7 Extent that Local Government Regulation of Internet/Broadband Service is Pre-Empted

In Belgium, the regional governments of Flanders, Wallonia and Brussels are competent to enact legislation regarding internet or Broadband network infrastructure and infrastructure licensing in their respective regions, without pre-emption. The three regional media regulators (VRM, CSA and Mediarat) also have a shared competence with the federal BIPT in relation to the supervision on net neutrality compliance.

Apart from these exceptions, electronic communications networks and services are governed by a federal regulatory framework under the Electronic Communications Act of 13 June 2005. This regulatory framework is regulated by a single regulator, the BIPT.

7. Privacy

7.1 Government Access to Private Communications

Several provisions in different legislative instruments permit judiciary and administrative authorities to intercept or obtain the disclosure of private communications.

The Belgian Code of Criminal Procedure (CCP) makes it possible to impose measures for the interception of communications for investigation purposes, as well as to obtain the disclosure of communications data. Interception measures are regarded as special investigation measures for which an examining magistrate needs to issue a warrant (Article 90 ter to 90 decies CCP). The warrant is subject to strict formal and justification requirements. The period for which the interception measures are in place cannot exceed one month from the date of issuance of the warrant. The CCP also allows for the disclosure of communications data to the public prosecutor or examining magistrate. The public prosecutor can request the necessary information from the electronic communications operator that enables the identification of a subscriber or user of an electronic communications service or the service itself (Article 46 bis CCP). An examining magistrate is entitled to request traffic data or other information to identify the origin or destination of electronic communications, or the device used (article 88 bis CCP).

The electronic communications operator is obliged to cooperate with the judicial authorities in relation to the investigative measures. This legal co-operation duty is laid down in the Royal Decree of 9 January 2003. It also includes the obligation for each electronic communication operator to establish a “co-ordination unit” consisting of one or more

assigned persons who are permanently available to meet the cooperation obligations.

The Intelligence and Safety Services Act of 30 November 1998 gives national intelligence and safety services the authority to take interception measures and request the disclosure of certain private communications. The Act considers interception measures as exceptional measures for the collection of data, which are only possible after a specific authorisation by the Director-General of the intelligence or security services, subject to a positive advice by the supervisory Administrative Commission for specific and exceptional measures of investigation by intelligence and safety services. Article 18/9 of the Act describes the circumstances in which interception measures by the State Security Service or the General Intelligence and Security Service are possible, such as in cases of serious threat to the internal or external national security as a result of espionage or terrorism. The Intelligence and Safety Services Act also allows for these authorities to collect identification or localisation data from electronic communications operators. The collection of this data is considered as a specific method of investigation, which means that a written and reasoned decision of the Director-General, together with a notification to the Administrative Commission, is necessary.

The Royal Decree of 12 October 2010 determines the requirements for the legal co-operation duty of electronic communication network operators and service-providers in case of measures taken by intelligence and safety services. It also creates the obligation for the establishment of a “co-ordination unit”.

Lastly, Article 126 §2 of the Electronic Communications Act provides that electronic communications operators have the obligation to provide, upon simple request and without delay, the necessary data to judicial authorities, intelligence and security services, judicial police, emergency services, the ombudsman for telecommunications and the auditor of the FSMA in relation to the specified legitimate purposes (see **7.5: Obligation of TMT Companies to Retain Customer Data** below).

7.2 Use of Encryption Technology

There are no legal requirements for Telecom Media Technology providers to use encryption technologies. Article 48 of the Electronic Communications Act provides that the use of encryption is free. The provision of encryption services to the public is, however, subject to a prior notification to the BIPT, but only if it concerns encryption services which are designated by a royal decree.

While the use of encryption remains free, the legal cooperation duty of electronic communications operators (see **7.1: Government Access to Private Communications** above) demands

that the requested data is comprehensive, meaning that the operator can be asked to remove any encryption. This does not mean that the use of encryption technology is prohibited. Article 127 §2 of the Electronic Communications Act provides that the supply or use of a service or device that hinders or prevents the execution of the identification measures is prohibited, with the exception of encryption systems used to guarantee the confidentiality of the communication and the safety of the payment.

7.3 Liability of TMT Companies for Content Carried Over Their Networks

Book XII of the Belgian Code of Economic Law (CEL) deals with the laws applicable to the electronic economy. It prescribes the rules regarding the liability of service-providers acting as intermediaries. The specific liability regime is a result of the Belgian transposition of the EU Directive 2000/31/EC on Electronic Commerce.

Telecom Media Technology (TMT) companies offering an information society service that consists of the transmission, by means of a communication network, of information provided by a recipient of the service, or the provision of access to a communication network, are not liable for the information transmitted on the condition that the service-provider:

- does not initiate the transmission;
- does not select the receiver of the transmission; and
- does not select or modify the information contained in the transmission.

The acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary (Article XII.17 CEL). An information society service is defined as “every service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service” (Article I.18 CEL).

In practice, TMT companies can be exempted from liability on the basis of this “mere conduit” exception when they act as an intermediary and their services have a mere technical, automatic and passive nature. This implies that the intermediary service-provider has neither knowledge of nor control over the transmitted information. A TMT company actively exercising control over the content of the transmission may, on the other hand, incur liability as an intermediary.

The same applies to the liability exemptions relating to “caching” (Article XII.18 CEL) and “hosting”. Hosting services consist of the storage of information provided by a recipient of the service. In this case the service-provider is not liable

for the information stored at the request of a recipient of the service on the condition that:

- the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information (Article XII.19 CEL).

Additionally, TMT companies providing services of “mere conduit”, “caching” or “hosting” cannot be imposed a general obligation to monitor the information carried over on their networks. Specific temporary monitoring obligations imposed by a competent judicial authority are however possible (Article XII.20 CEL).

7.4 Obligation of TMT Companies to Block Access to Certain Sites or Content

TMT companies, especially internet service-providers, may be required to block access to websites which contain content infringing the rights of third parties.

The president of the court of first instance or of the commercial court may order an injunction against an ISP or other intermediary, the services of which are used by third parties to infringe intellectual property rights (Article XVII.14 §4 CEL). This article is the result of the transposition of Article 11 of EU Directive 2004/48/EC (Enforcement Directive). In this way, intellectual property right holders or organisations representing their interests may obtain a court order against an ISP to block access to certain websites infringing their rights. However, a court cannot order an ISP to implement permanent monitoring measures.

In 2013 the Belgian Supreme Court (Court of Cassation) upheld an injunction regarding all Belgian ISPs to block access to the “piratebay.org” and other referring domain names, based on content made available on the platform infringing the intellectual property rights of third parties. The Court of Cassation held that such an injunction did not equate to the imposition of a general monitoring obligation, as it did not require the ISP to monitor the information that he transmits or stores, or to actively search for facts or circumstances that indicate illegal activity.

Additionally, hosting providers have an obligation to expeditiously block or remove access to illegal content of which they are made aware either through a court order or any other notification. In this case, the service-provider must expeditiously notify the public prosecutor (Article XII.19 CEL).

The public prosecutor, upon notification by a hosting provider, the Federal Computer Crime Unit, the Gaming Commission, Customs Authority or other competent entity, can impose the blocking of access to a website or the removal of illegal content. This procedure requires that the data is the object of an offence or is produced by an offence, and that the data is contrary to the public order or morality, or represents a danger to the integrity of information systems or to data that are stored, processed or transmitted through these systems (Article 39bis CCP).

The public prosecutor decides on the blocking of access to certain websites on a case-by-case basis, without the need to refer the case to a court or other independent review mechanism. There is no central list of websites that must be blocked. Both domestic and foreign websites can be blocked, mostly for reasons of unlicensed gambling, intellectual property infringements, racism or extremism, the sale of illegal pharmaceuticals and counterfeiting. In 2016, the economic inspection and customs authority have blocked almost 3,000 websites selling counterfeited products.

7.5 Obligation of the TMT Companies to Retain Customer Data

Following the annulment by the EU Court of Justice of EU Directive 2006/24/EC (Data Retention Directive) on 8 April 2014, the Belgian Constitutional Court annulled the former Article 126 of the Electronic Communications Act, which dealt with the obligation of electronic communications operators to retain traffic, location and customer data.

On 28 July 2016, the new Act of 29 May 2016 on the collection and storage of data in the electronic communications sector (Data Retention Act) came into force. The Act amended the previous version of Article 126 of the Electronic Communications Directive and added a new Article 126/1. It determines which data the providers should retain, when the starting point of retention is and for how long the retention is necessary. Although the new Act does not alter the data retention period of 12 months, it does provide for more guarantees for the protection of privacy and data.

Electronic communications operators are required to retain customer identification data, access and location data of devices, and communications data, with the exclusion of content data. The new Data Retention Act limits the number of competent authorities which can request access to the data in a limitative way. Authorities which are allowed to receive the data are judicial authorities, intelligence and security services, judicial police, emergency services, the ombudsman for telecommunications and the auditor of the Financial Services and Markets Authority. Unrestricted access to the data must be provided expeditiously and upon mere request of those listed authorities. However, access is only allowed in relation to specifically defined underlying

purposes and circumstances. Electronic communications operators are required to keep the stored data confidential in all other circumstances.

In a controversial decision of 27 October 2016, the criminal court of Mechelen fined Skype EUR30,000 for failing to hand over specific communications data in relation to a criminal investigation of 2012. The judgement considered Skype to be an electronic communications service-provider, subject to the retention obligations. The court argued that it was irrelevant that Skype did not control its own network infrastructure or that it did not intervene in the direct exchange of data between the information systems of its users. The fact that its software is wholly or mainly intended and used to enable communications between users over the Internet was considered sufficient. It remains to be seen if the judgement will have future implications for other OTT communications service-providers.

7.6 Prohibited of Unsolicited Communications

Article VI.110-VI.115 CEL regulates the provision of unsolicited communications. The use of automatic calling systems without human intervention or faxing with the intention of direct marketing is prohibited without the prior free, specific and informed consent of the recipient of the communications. The recipient has the right to withdraw his consent at all times, without justification and at no cost.

However, unsolicited communications for direct marketing purposes which use other means are allowed in the absence of clear opposition by the recipient. The undertaking responsible for the unsolicited communications is, however, obligated to identify itself. Additionally, an electronic communications operator is required to implement a free opposition procedure and record the oppositions in a database, which is communicated to the relevant marketing undertakings. Unsolicited telephone calls to persons recorded in the oppositions database are subsequently prohibited.

8. Future

8.1 Status and Process of Convergence

Electronic communications services and network are regulated based on the principle of technological neutrality. A single federal regulatory authority is charged with regulating and monitoring the electronic communications sector. That is the BIPT. Next to telecommunications, radio and post, the BIPT is also responsible for the regulation of the audio-visual media sector in the bilingual Brussels Capital Region.

In Flanders, Wallonia and the German-speaking community, audio-visual media is regulated on a community level. However, as a result of the convergence between the media and electronic communications sector, the different com-

munities and the federal state concluded a Cooperation Agreement on 17 November 2006. This agreement implements a consultation procedure when drafting regulation on electronic communications networks. It also requires the BIPT, as the federal electronic communications regulator, and the different community media regulators to exchange information and to co-operate. An overarching body with representatives of the different regulators, the Conference of Regulators (CRC), was introduced to facilitate the co-operation and make decisions on matters relating to both federal electronic communications and regional television and broadcasting competencies. In this respect, the CRC made a decision in 2011 to open up the television broadcasting market by requiring operators to provide wholesale access to their cable networks.

Convergence is also apparent from the increasing consolidation on the Belgian TMT markets. Network operators and content-providers aim to achieve economies of scale and scope next to other strategic advantages through mergers, acquisitions or partnerships. On 4 February 2016, the EU Commission decided to clear the previously announced acquisition of BASE Company by Telenet (Liberty Global). The acquisition was subject to several conditions, one of which was the establishment of a new mobile virtual network operator, Medialaan, which was already active as a broadcaster in Belgium. A year before, on 24 February 2015, the EU Commission had already cleared another acquisition by Liberty Global in Belgium. Liberty Global, which controls television distributor Telenet, was allowed to acquire a stake in broadcaster De Vijver Media NV. The acquisition was subject to conditions, such as the conclusion of carriage agreements.

The fact that more than 60% of Belgian families opt for bundled telecom and broadcasting services with the same service-provider demonstrates further convergence. Additionally, the increased use of OTT services led the BIPT to support the imposition of a more level playing field by extending the scope of application of the electronic communications regulatory framework to OTT service-providers. With the introduction of the European Electronic Communications Code (ECC) in the near future, the European legislator will address these concerns by including interpersonal communications services under the definition of electronic communications services (see **6.6: Over-the-Top Internet-Based Providers** above).

8.2 Changes to Statutes, Laws or Legislation

On 31 July 2017, a new Act pertaining to various provisions regarding electronic communications was introduced. The Act amended several provisions on electronic communications. It clarified the competencies of the BIPT and introduced the possibility to take preliminary measures. It also provided the BIPT, in replacement of the Belgian Competition Authority, with the competencies to resolve disputes

between electronic communications operators by way of a binding administrative decision. Additionally, the Electronic Communications Act is amended to implement EU Directive 2014/16/EU and to amend provisions on, inter alia, frequency licence obligations, network security, consumer rights, subscription payments and number blocking.

Recently, the Belgian minister of Digital Agenda, Telecom and Post, Alexander De Croo, has launched a consultation on the website of the BIPT regarding the auction procedure for frequency spectrum licences in the existing frequency spectrum and the new 700 MHz frequency band, which will be used for 5G mobile broadband. The licences will entail coverage obligations for network operators with an aim to achieve 99.5% coverage on the Belgian territory. The consultation is in line with the minister's Digital Belgium Action Plan, which aims to promote digital development in Belgium in five key areas, namely infrastructure, safety, government, economy and employment.

Changes to the European electronic communications regulatory framework are expected as a result of the introduction of the European Electronic Communications Code (ECC). Proposal COM/2016/0590 - 2016/0288 aims to adjust the current regulatory framework to the digital paradigm shift. Changes in Belgian legislation are expected because of the implementation of the ECC.

8.3 Changes to Government Ministries, Regulatory Agencies or Privatised Entities

There are no changes expected to government ministries, regulatory agencies or other governmental or privatised entities that have a role in making policy and regulating TMT industries. The Belgian government has been in place since 11 October 2014. Therefore, we do not expect additional changes to happen before the elections of 2019. The national regulatory authority, the BIPT, is represented by its council. The Council is composed of four members, which are appointed for a six-year term. The current members were appointed on 23 December 2016. Therefore, we do not expect the composition of the Council of the BIPT to be amended in the next six years. The managing director of the incumbent operator Proximus, Dominique Leroy, was appointed by the government on 9 January 2014. No further changes are expected in the coming three years.

8.4 Identification of Assignment of Additional Spectrum

The minister of Digital Agenda, Telecom and Post, Alexander De Croo, has recently launched a consultation regarding the allocation of frequency spectrum for mobile network operators. Part of existing frequencies in the 2G and 3G frequency bands will be automatically assigned to existing operators, the remaining part will be auctioned. The auction procedure also aims to assign spectrum in the new 700 MHz and the 3400-3800 MHz frequency bands which will be used to establish 5G mobile broadband on the Belgian territory. Frequencies in the 5G frequency bands are expected to be auctioned and used by 2020.

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