

# TMT REPORT 2013: KEEP UP OR LOG OUT

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**No longer a niche practice, TMT has taken the legal world by storm. And lawyers say that one thing is very clear in today's 'digital economy' – these days there is no industry that isn't affected by TMT. But the sector is evolving at such a rapid pace, that clients, law firms and regulators are having a very hard time keeping up, and applicable legal frameworks are almost out-dated before they become effective.**

TMT is now an intrinsically 'global' sector, as regardless of whether or not clients 'physically' globalise their operations, the majority of business these days is conducted via the Internet and e-commerce – which know no frontiers.

Players in the Iberian TMT market are innovative and very active. "Their innovation departments are always looking for new products and services that can bring value to clients," says Magda Cocco, Co-Head of Telecoms & Media at Vieira de Almeida, "and, most of the time, these new products and services challenge traditional legal concepts".

But the TMT laws are a step behind the actual development reality, explains Javier Marzo Cosculluela, Co-Head of TMT at Garrigues, Spain, as the sectors are so technologically advanced and change at a very fast pace.

Despite being a fortunate and healthy industry, certain areas, particularly those that have not yet adapted their business models to the digital economy – traditional press, broadcasting, etc – are suffering. "What is clear is that disruptive technologies will transform business," says Javier Fernández-Samaniego, Managing Partner and Head of TMT at Bird & Bird Madrid, "pushing Spanish

and global economies forward".

Companies must always stay ahead of their competitors, and reinvent themselves and their products in order not to be left behind, says Rodrigo Almeida Dias, a Corporate and TMT Partner at F. Castelo Branco & Associados. Therefore, imagination, proactivity and reaching out to the ever-more demanding needs of consumers are key elements in this extremely competitive industry.

## The challenges of innovation

It seems that every day there are new methods of communicating, says Pablo Mayor, Head of Public Law at Allen & Overy, as well as new devices, users and ways of providing services.

And both businesses and individuals are part of this digital economy, with smartphones, tablets, the Cloud and social networks forming part of their daily lives. "Therefore, one of the main challenges of the TMT sector is to find the right balance between increasing consumers' demand for services and products, and the level of security required to ensure privacy rights," explains Francisco Brito e Abreu, Corporate Partner at Uría Menéndez - Proença de Carvalho.

Another issue is that the subsectors are converging – telecoms and contents for example – accelerated by the massive increase in use of mobile devices. "The challenge for clients is that they don't always have the expertise to deal with these 'neighbouring' markets and end up competing for the same clients," says Raul Rubio, IT and Communications Partner at Baker & McKenzie, Madrid, "but coming from very different backgrounds".

Every year there are new IT applications and devices, innovative software and social conducts that lack enforceable regulatory support. "We strive to help clients to be protected and confident in this transforming environment, as we have to be constantly learning about technical developments," says Norman Heckh, Director at Deloitte Abogados. In the coming years, almost every company will therefore have to focus its business on the Internet and new technologies, and law firms need to be prepared to provide the most up-to-date support.



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The speed of change also presents special challenges for the industry itself. "We are witnessing big players in the tech industry, such as Blackberry or Nokia, struggle when their products and services are no longer current in the market," says

Hugo Écija, Managing Partner of Ecija. "TMT is not about adapting to the market – you're either in or out – it is about innovation and anticipation."

And innovation is a key concept for success in today's crisis economy – but the difficulty is finding the funds to do so. "Access to capital is difficult," explains Almudena Arpón de Mendivil, TMT Partner at Gómez-Acebo & Pombo, Madrid, "and companies have to invent new forms of generating funds for their research and development projects".

The difficulty is to be able to predict future problems in an area that changes at such astonishing rate. As well as explaining to clients that the existing entities – regulators, courts and public administration – evolve at a much slower speed, says Filipe Mayer, a TMT Partner at CCA Advogados, and, in most cases, are unprepared to reply in a suitable way to the challenges placed by this sector.

In the 1990s, there was time to plan and think about where technology was going, adds Pablo González- Espejo, Head of TMT at Uría Menéndez. "Nowadays, there is little time to regulate as things change so fast and keep getting faster. Regulations can hardly keep up with the industry and therefore don't always meet the expectations of the market."

As TMT involves state-of-the-art innovation that changes so quickly, as lawyers we are always betting on what the regulators may do, says Diego Ramos, Head of TMT at DLA Piper Spain. And across Iberia, many developments have taken place recently, while some very notable examples do stand out.

## Communicating issues

The recent proposal to overhaul the EU Telecommunications rules – ‘Connected Continent: Building a Telecoms Single Market’ – aims to open up a very fragmented market, say lawyers. Key changes include the end of mobile roaming premiums and a guarantee of ‘net neutrality’. But opponents argue that it is unachievable in its current format.

The Spanish Government has recently approved a new Telecoms Act to include the technological advances of recent years. The aim, say lawyers, is to foster the development of the country's digital economy, promote competition, offer more affordable tariffs and facilitate the introduction of next generation networks. However, given how fast the industry changes, there are concerns that the new Act will be obsolete from the moment it is enacted, explains Blanca Escribano, Co-Head of TMT at Olswang Spain LLP, as it will come into force after the ‘Connected Continent’ package is published, which finally tackles the real competition problems that the industry is facing.

The growth in data traffic and the need for data to be quick and efficient means that operators are also making major investments in Long Term Evolution (LTE) networks for 4G services, says Carmen Burgos, Counsel and member of the TMT group at Linklaters Madrid, and driving heavy investment in fibre optics. Telefónica and other operators’ recent and projected €25bn investment in fibre optics, for example, is a historical investment, which will revolutionise the digital market in Spain, says Javier Torre de Silva, a Public, Regulatory and TMT Partner at CMS Albiñana & Suárez de Lezo.

Traditional telecom services are becoming commoditised and the digital economy is where everything is heading. “And now you find big players like Telefónica competing with the so called GAFA – Google, Amazon, Facebook and Apple,” says Escribano at Olswang Spain LLP.

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F. Castelo Branco & Associados



Portugal has also seen considerable

developments, particularly in electronic communications – a trend that is set to continue, say lawyers. On the one hand, there is an increasing convergence of services with bundled and new digital services being made available by several operators, says Brito e Abreu at Uría Menéndez - Proença de Carvalho. “On the other, the country's technological development and modernisation has been one of the Government main objectives in recent years, in line with the Lisbon strategy.” And after five crisis years, the TMT sectors are starting to conclude M&A projects and transactions. This global phenomenon is already domestically visible, says Jaime Medeiros, a Founding Partner of Coelho Ribeiro e Associados, with recent mergers in major telecoms and cable operators. The most noteworthy being that between cable TV operator Zon Multimedia and mobile phone unit Optimus (controlled by Sonaecom), resulting in the creation of a new operator ‘Zon Optimus’, says Marta Costa, Senior Associate in TMT at PLMJ, which will increase competition in the Portuguese market with the incumbent operator Portugal Telecom.

Another challenge on the horizon is the designation of the new Universal Service Providers (USPs), explains Margarida Couto, Co-Head of Telecoms & Media at Vieira de Almeida. “These changes will certainly make an impression on several regulatory matters, therefore we will certainly have a very dynamic year in what concerns legal and regulatory advice.”

## Virtual communication

Traditional media has become outdated – now it is about content, networks and service providers, and the problem is how to regulate something that everyone can access at any time on any platform or device, explains Sylvia Alonso, Head of TMT at Avego Abogados, a legal boutique specialising in Litigation, Commercial and TMT. The belief is that the industry will need to be more self-regulating and take responsibility when it comes to the content it puts out.

One ruling that recently shook the sector is that of the Spanish Supreme Court in November 2012, cutting a number of broadcasting channels granted by the Government in 2010, without specifying

how may and when, explains Cosculluela at Garrigues. "2013 Government decisions implementing this ruling have not yet clarified the situation – so how do you explain this uncertainty to foreign investors, such as Disney or Paramount?" The sector is eagerly awaiting the outcome of the ongoing deliberations, say lawyers.

The media sector has been a victim of the crisis, particularly with the tightening of advertising budgets. Operators keep trying to maintain the quality of contents while decreasing the amount spent, says Roberto Sánchez, Managing Associate and member of the TMT group at Linklaters Madrid, and in the pay-tv sector, maintaining average billing per client is clearly a major challenge nowadays. Consolidation has been a recent trend to compensate for the slowdown in advertising, particularly in Digital Terrestrial Television (DTT) – between 2011 and 2012, four Spanish TV stations merged into two groups: Antena 3/La Sexta and Telecinco/Cuatro.

In Portugal, media is also the most affected sector. The Internet and digital newspapers, coupled with the decrease in advertising, caused a deep crisis in the written press, which is trying to reinvent itself to survive, explains Ana fazendeiro, a Lawyer at Abreu Advogados. "As one of the consequences, some Portuguese newspapers – SOL, Diário de Notícias and Jornal de Notícias – have been partly acquired by Angolan Groups."

Traditional media groups are being forced to review their business models and accept outside investments due to the steady growth in online and no-cost advertised-based media. And TV, cinema and music are still struggling to find new business models adapted to the Internet – and, say lawyers, unless they do so quickly, they run the risk of being overtaken by the new dominant players, such as Google and Facebook.

### **Cyber and data security**

Wikileaks and recent cases involving US National Security's surveillance programmes have put a spotlight on cyber security and data protection issues, as well as the potential dangers of the Cloud. Handling data breaches and cyber security are among the biggest issues, not only for telecom operators and companies operating online but for any corporation, says Fernández-Samaniego at Bird & Bird, as IT is at the heart of the operations of most of these organisations.

Companies are demanding legal advice on e-commerce as they are increasingly replicating their physical business in the 'online' world, says Marc Gil, Head of Corporate and IT Law at Adarve Abogados. But with this comes having to embrace the concept of 'cyber security' and protecting a 'virtual' business.

Five years ago it was just banks and insurance companies that were worried about cyber security as they had so much to lose online, says Écija at Ecija. "Now it's every single company and it's a market worth billions – so everyone wants to know how to protect all of their assets'.



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One major challenge is the comprehensive reform of the EU Data Protection regime, expected to take effect in 2014. With a proposed EU harmonised law and a single 'one-stop-shop' supervisory authority, compliance is going to be key, as fines could amount to up to

two percent of annual worldwide turnover, say lawyers. And this will impact most 'online' sectors, including e-commerce, social networks, online gaming, publicity and advertising, device apps, to name just a few.

And the sector is awaiting the outcome of the European Court of Justice (ECJ) pending data retention cases. The ECJ is asked, in both preliminary rulings, to decide upon the compatibility of the Data Retention Directive with several articles of the Charter of Fundamental Rights of the EU related to the protection of privacy, says João Gonçalves Assunção, a Senior Associate at Abreu Advogados. "The responses of the judge will be very important from the point of view of individual users of data

and their right to privacy.”

The ‘Cookies’ Laws continue to raise issues as companies must obtain users’ prior consent to the use of cookies and similar technologies that collect personal data through websites. The laws are unclear as to actual implementation, say lawyers, and operators are more aware of the importance of data compliance, protection and breaches – fines can reach up to €5m.

The fast rate of adoption of cloud computing demonstrates the importance of this new solution, say lawyers, prompting a need for companies to review their systems, third-party provider contracts and security solutions. Cloud computing is liable to generate significant economic benefits for its users, since there are no installation costs but only on a pay-as-you-use basis which reduces economic risk, but raises several issues and concerns regarding data protection, says Leonor Chastre, Head of IP, Media and IT at Cuatrecasas, Gonçalves Pereira, Portugal. “The proliferation of this technology represents a challenge in terms of data protection, due to the risks associated with the lack of control over the data and the lack of sufficient information on how, where and by whom the data is processed.”

The future creation of a unified patent system in the EU, with the Unified Patent Court, will also represent a new challenge and a new area of business for legal firms, says Vera Lúcia Madeira, Head of TMT at Raposo Bernardo. The rules, due to come into force in January 2014, aim to reduce costs by approximately 80 percent, say lawyers, provide uniform EU-wide protection, and make the EU more competitive with jurisdictions such as China and the US.

The Spanish Government has also proposed reforms to its IP Law to adapt it to recent changes in business models and in the services demanded by users. “It is necessary to introduce measures to encourage the generation of ‘lawful’ content,” says Rafael García del Poyo, Partner in the Digital Business Department at Osborne Clarke Spain, “as only by developing legal measures related to the management of the so-called ‘private copying’, the establishment of anti-piracy measures, or addressing a more detailed regulation on rights management entities can we put Spain in a position to compete with the industries of other countries in a globalised economy”.

### **Competitive advantages**

TMT’s principal role for clients is to take advantage of cost efficiencies and reduce company infrastructure costs, increase competitiveness, ease access to users and faster manage customer relations through social media resources and improve productivity and immediateness, explains Heckh at Deloitte Abogados.

Lawyers believe we are on the verge of an industrial revolution, given all the new products and technologies that are flooding the market. And as we rapidly move towards an Internet-based economy, TMT plays a fundamental role in the innovation and growth of any business.

From e-health, e-payments and mobile applications to entire factories and industrial processes being controlled via iPads, tablets or even smartphones – the sky’s the limit when it comes to the possibilities for businesses.

TMT now provides unprecedented levels of business acumen to IT-savvy small and individual entrepreneurs, says Luis Manuel García, Corporate Partner at Lupicinio Abogados International Attorneys. “They can use tools that large corporations would have only dreamed of a few years ago, at very affordable prices. And new technologies and tools seem to be appearing every day, for example, the possibilities enabled by Google Glass – like products or by 3D Printing.”

Information is likely the most important asset a company has. And TMT is developing and providing new tools for the maintenance, management and obtaining of, and more importantly, access to such data, says Ricardo Rodrigues Lopes, a TMT Partner at Caiado Guerreiro. The possibilities of accessing to data everywhere is seen as an important competitive advantage, thus the success of the Cloud.

Lawyers are seeing clients moving from the ‘real economy’ to a ‘digital’ one, with the aim of becoming multinational e-commerce players. And Spanish ‘technology natives’ – who have technology and innovation in their DNA – have more of a proactive rather than reactive approach,

says Belén Arribas Sánchez, Senior Associate in IT and Data Protection at Monereo Meyer Marinel-lo Abogados.

The use of social networks as a way to keep in touch with customers is becoming increasingly popular, even in sectors that were traditionally quite opposed to these communication channels. Twitter, Facebook and LinkedIn have become marketing tools and even sales channels for many companies. "The expansion of cloud computing and SaaS solutions has allowed companies to reduce costs with tools that are easy to use," adds David Miranda, Head of Digital Business at Osborne Clarke Spain. "The use of mobile technology is delivering a competitive advantage to those companies that have rebuilt their business processes to work in a mobile world."

Online shopping has been hugely successful all over the world with customers attracted to the high levels of convenience – as online stores are available 24 hours a day, says Almeida Dias at F. Castelo Branco & Associados, as well as to broader selections, competitive pricing and greater access to information.

Every company wants to reach consumers online at every location (via mobile), says Ricardo Henriques, a Senior Associate in IP/TMT at pbbbr, and media and advertising are an essential part of that strategy.

Internet advertising is a fascinating tool, which enables companies to conduct a global campaign at a really low cost, through interacting with future clients and collecting data about their tastes and priorities, says Mario Embid Ruiz, a TMT Lawyer at Cremades & Calvo Sotelo.

And the technology for remote and 'off station' working is more and more in vogue, becoming essential to a company's development and costs control, says Ana Rita Paínho, Head of TMT at Anselmo Vaz, Afra & Associados

The development of TMT has enabled companies and individuals to do far better research on the markets and consumer demand. They are therefore able to offer better goods and services to customers, says Vítor Marques da Cruz, Founding Partner at Marques da Cruz e Associados, as well as developing new ones more adapted to the market's needs.

### **'Digital' is the way forward**

These are very exciting times we are living in, says Alonso at Avego Abogados, and technological developments have taken us to places we could not even imagine. Constant innovation and excellent client service are key in an extremely competitive environment. And, says Pedro Callol, a Competition and TMT Partner at Roca Junyent, it is probably accurate to say that nowadays virtually no company can survive without technology.

"Technology is no longer niche, it is transversal, horizontal, and essential to today's economy," says González-Espejo at Uría Menéndez. "All sectors, with more or less intensity, are affected by TMT." Companies have clearly understood how technology can be a key differentiating factor in today's global economy, say lawyers, and the clever use of TMT can prove the difference between survival and disappearing altogether. Something that applies in equal measure to today's law firms.

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**Uría Menéndez**



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### **What clients want**

"If you look at our TMT clients eight years ago, they were very much dependent on credit – their business model was to use this to develop new technologies," says Ramos at DLA Piper Spain. "But the credit crunch means this business model doesn't work anymore and this has left them facing

huge challenges.”

Clients are seeking innovative technological solutions to improve delivery of their services, build their businesses and help customers achieve their goals, say lawyers. And with this comes a wave of new needs for lawyers to address, including the increasing requirement to comply with existing TMT regulations.

Privacy and cyber security are the biggest client concerns these days, from smartphones and tablets to the Cloud and online business. And compliance is key, say lawyers, especially with the increasing amount of obligations and requirements – both locally and internationally – with which they must comply – which can often affect the companies' competitiveness. Regulators are worked intensively to assure that compliance is not forgotten, and lawyers and clients are noticing that the authorities, both domestic and international, are coming down on any infraction.

The current EU Data Protection Reform, cloud computing and online business development, and IT issues are top of the agenda and impact on every industry. And the Telecoms sector is seeing a rise in cases of anticompetitive practices.

In Spain, in particular, the new draft Telecoms Law is prompting requests for advice on the implication of the new obligations and how to apply, comply and implement. The role of public administrations in the provision of telecommunications services and its impact on the market in terms of competition is also an area of concern, adds Carme Briera, Corporate- Administrative Law Counsel at Clifford Chance.

And outside the telecoms sector, says Alfredo Gómez-Acebo Dennes, Head of Public, Administrative and TMT at Cremades & Calvo Sotelo, there is great interest in the distribution of audiovisual content over the Internet and the obligation to pay associated rights.

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## **The new 'super regulator'**

In Spain, a key development is the recent unification of the telecommunications, energy and competition regulators under the National Markets and Competition Commission (CNMC), explains Javier Aparicio, a TMT Partner at Cuatrecasas, Gonçalves Pereira, Madrid.

And the first challenge is to see how the new CNMC will work, and the hope is that the union won't cause any delays or interruptions to the regulator's current work.

“The transition seems to have been carried out quite smoothly,” says Paloma Bru Arce, Of Counsel and Head of Government Regulation (TMT) at Jones Day, Madrid, “however, we feel that there is a risk that the way the different bodies are managed will mean some changes in the criteria applied that could affect the workings of the various bodies.”

“The EU wanted a more independent regulator in Spain,” adds Torre de Silva at CMS Albiñana & Suárez de Lezo, “but what we have done with the new Super Regulator is quite the opposite”.

Lawyers agree that there is a great deal of uncertainty among clients regarding this new regulator, the functions it assumes and how these will be developed.

The common concerns are the prevailing criteria within the new Regulatory Body – effective regulation and fair competition, says José Ramón de Hoces, a Partner at Pérez-Llorca, as well as the distribution of powers between the various Governmental TMT Ministries and the new CNMC.

The creation of the CNMC has created huge expectations in the legal sector.

However, it remains to be seen how exactly it deals with the different TMT sectors, particularly telecoms and media, concludes Ainhoa Veiga, a Partner at Araoz & Rueda.

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## **Taking a legal advantage**

TMT presents a brave new world of opportunities for law firms, says Cocco at Vieira de Almeida. "The electronic communications, media and technology sectors are, by definition innovative, and every day a new product and/or service is launched, raising new and challenging legal questions." And there are always new challenges that must be adequately explored and tackled by firms with lawyers with the necessary expertise and training, adds César Bessa Monteiro, IT & TMT Partner at pbbbr. To do so, law firms need to have teams with highly specialised knowledge in regulation, IP, competition and data privacy, an inside industry perspective and a full understanding and passion about technology. "Clients don't want legal advice in TMT, they want solutions," says Rubio at Baker & McKenzie. "And so if you have to work with financial advisers or consultants to achieve it then so be it."

In this age of constant and dynamic changes, there are numerous trends and concerns that have emerged in the legal market. "The evolution of technology has transformed production processes to such an extent that it has largely replaced a human workforce," says Ignasi Costas, Head of Innovation and Entrepreneurship at Rousaud Costas Duran. However, interpreting the law and adapting it to clients' needs continues to be an essentially intellectual task, where creativity, experience and expertise are the differentiators from a technological response.

Social networking, e-commerce and the creation of new or development of current devices will be the emerging areas for TMT in the next years, due to the growth of Internet giants such as Facebook, LinkedIn, Amazon, Apple, Samsung, etc, says Álvaro Marco, Director of Corporate & Commercial at BDO Abogados y Asesores Tributarios, as well as the extension of e-commerce, also among the traditional sellers and distributors and a wide spectrum of consumers.