



# ICLG

The International Comparative Legal Guide to:

## **Telecoms, Media and Internet Laws and Regulations 2013**

**6th Edition**

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

Published by Global Legal Group with contributions from:

Alain Bensoussan Avocats  
Attorneys at law Borenus Ltd  
Bello, Gallardo, Bonequi y García, S.C.  
Com advokatbyrå HB  
Cugia Cuomo & Associati  
DLA Interjuris Abogados, S.C.  
Dr. Norbert Wiesinger, Law Offices  
Ferchiou & Associés  
Harris Kyriakides LLC  
Heuking Kühn Lüer Wojtek  
id est avocats  
King & Wood Mallesons  
MNKS  
Mori Hamada & Matsumoto  
NautaDutilh N.V.  
Olswang LLP

Pachiu & Associates  
Schoenherr  
Shay & Partners  
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Sociedade Rebelo de Sousa & Advogados Associados, RL  
Squire Sanders  
SyCip Salazar Hernandez & Gatmaitan Law Offices  
Tashko Pustina  
Tilleke & Gibbins  
Udo Udoma & Belo-Osagie  
Ulhôa Canto, Rezende e Guerra Advogados  
Vasil Kisil & Partners  
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Alan Falach

**Group Publisher**

Richard Firth

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Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

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# Thailand

Tilleke & Gibbins

David Duncan



## 1 Overview

- 1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in Thailand, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.**

Thailand is in the middle of a major transition in its regulation of the telecommunications and media industries. Several years ago, the business of electronic communications and media were the domain of the government, through its various state-owned enterprises. Since those days, Thailand has embarked on a regime of providing for healthy competition among many different providers, though there are still numerous issues to be overcome. Some issues include the proper role for each of the major state-owned telecom operators, TOT and CAT, and how the existing telecom concessions granted by those entities will be handled in the modern system of licences and permits.

There are currently three major private mobile carriers, AIS, DTAC, and True Move, all of which vigorously compete. Landline services are provided primarily by TOT, True, and TT&T. As for media, free-to-air channels still have significant state involvement, whether through the Mass Communications Organization of Thailand (MCOT), the Royal Thai Army, the Government Public Relations Department, or the Thai Public Broadcasting Service. MCOT has contracted the operation of its channel to BEC-TERO, a private operator which is part of BEC World. As for cable and satellite television, there are many operators in the Kingdom, but the primary operator is True Visions (formerly known as UBC).

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

The primary pieces of legislation relevant to telecommunications, audio-visual media distribution and the internet are:

- The Radio Communication Act;
- The Telecommunications Business Operation Act;
- The Broadcasting Business Act;
- The Frequency Allocation Act; and
- The Computer Crimes Act.

There is a considerable body of administrative regulations and notifications promulgated under these laws.

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

Telecommunications, audio-visual media distribution, and the internet, are subject to regulation by the NBTC. The MICT (including the National Information Technology Committee and the National Electronics and Computer Technology Centre) also plays a significant role.

- 1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in Thailand?**

Type 2 and Type 3 licences are unavailable to entities considered “foreign” (as determined according to the provisions of the Foreign Business Act). However, Type 1 licences are available to both Thai and foreign entities. This effectively limits foreign ownership to less than 50%, in companies that offer telecommunications service through operation of their own telecommunications infrastructure. However, resellers can be wholly foreign-owned. As for media, foreign ownership in broadcasting licensees is limited to 25%.

## 2 Telecoms

### General

- 2.1 Is Thailand a member of the World Trade Organisation? Has Thailand made commitments under the GATS/GATT regarding telecommunications and has Thailand adopted and implemented the telecoms reference paper?**

Thailand has been a member of the World Trade Organisation since 1 January 1995, and has made commitments under GATS regarding both value-added services and basic telecommunications.

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

The provision of electronic communications networks and services are subject to regulation by the NBTC. The Ministry of Information and Communications Technology (MICT) (including the National Information Technology Committee and the National Electronics and Computer Technology Centre) also has a significant role in regulation. As a general matter, the sector is quite competitive, though it is more competitive in some sub-sectors than others.

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

The primary regulatory bodies relevant to telecommunications are the new NBTC and the MICT. The NBTC has promulgated many regulations and imposed many licence conditions in order to ensure competition. In parallel with this body of regulation, the Trade Competition Commission (TCC) is the general competition regulator in Thailand and has the authority to enforce antitrust regulations and rules against unfair trade practices across many industries. While both the NBTC and the TCC are envisaged as independent bodies, the members of each are appointed by the government, and their function can be moderated by the government as well.

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

Decisions of the NBTC can be appealed within the organisation itself, subject to the Administrative Procedure Act B.E. 2539 (1996).

## Licences and Authorisations

### 2.5 What types of general and individual authorisations are used in Thailand?

Primary authorisations take the form of licences, which are categorised as Type 1, Type 2, and Type 3. Each licence can have different endorsements, authorising the provision of different services.

1. **Type 1 Licence:** Type 1 licences are granted to telecommunications operators that provide service without their own networks. These types of businesses have been deemed appropriate to be fully liberalised. These licences can be granted upon notification by an operator that intends to operate such business.
2. **Type 2 Licence:** Type 2 licences are granted to telecommunications operators that provide service either with or without their own networks, but only when the services are intended for use by a limited group of people, or have no significant impact on competition, public interest, and consumers.
3. **Type 3 Licence:** Type 3 licences are granted to telecommunications operators that provide service with their own networks, which is intended for use by the general public or may impact competition, public interest, or consumers.

### 2.6 Please summarise the main requirements of Thailand's general authorisation.

Subject to few narrow exceptions, individual authorisations — in the form of licences described in question 2.5 — are required to legally engage in any telecommunications business.

### 2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

The subject matter of each form of individual authorisation is described in question 2.5.

Type 1 licences are valid for 5 years, Type 2 licences are valid for 15 to 25 years for operators with their own networks, or 5 years for those without their own networks, and Type 3 licences are granted for periods of 15 to 25 years.

Licensees cannot freely transfer or sub-license the rights granted under their licences, nor can they transfer the rights and/or responsibilities to operate their networks, in part or in whole, to third parties, if such would affect the services provided. However, there is a process by which the NBTC can consider and approve such arrangements. Note, however, that some lines of business are reserved for Thai nationals, and thus could not be transferred to foreigners or firms that do not have a majority of Thai ownership. In addition, there are even stricter restrictions that apply to businesses operating with a wireless spectrum.

## Public and Private Works

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

These issues are addressed in the Notification of the National Telecommunications Commission Re: Criteria and Procedures for Exercising Rights-of-Way in Erecting Poles, Laying Ducts or Cables, and Installing any Accessories for Providing Telecommunications Services. Depending on the type of easement required, a notice may be sufficient; otherwise, it may be necessary to negotiate an agreement. The regulation takes the general approach that such agreements should maintain equality, fairness, and impartiality.

## Access and Interconnection

### 2.9 How is network-to-network interconnection and access mandated?

There are several regulations on network interconnection and access. The primary regulation is the Notification of the National Telecommunications Commission Re: Telecommunications Network Access and Interconnection B.E. 2549 (2006).

Essentially, licensees operating their own telecommunications networks must:

1. Permit other licensees to interconnect with their networks.
2. Permit other licensees to access their telecommunications networks as a means to access their networks.
3. Provide transit services to other licensees through their telecommunications networks.
4. Provide roaming services to other telecommunications service providers.
5. Offer and provide unbundled network services and essential facilities of their own networks, to permit other licensees' access or interconnection with their networks.
6. Permit other licensees to access and employ technical specifications on their telecommunications network access, interfaces, and protocols or necessary technology for interoperability, in order to facilitate access or interconnection with their networks.

However, licensees with their own telecommunications networks may refuse to permit other licensees access to their network, if their existing telecommunications networks are insufficient to accommodate other licensees. In addition, access may also be

refused if there are technical difficulties in access, which may cause interference in or otherwise obstruct the telecommunications business.

#### 2.10 How are interconnection or access disputes resolved?

Parties may apply to the Dispute Resolution Committee of the NBTC. Detailed procedures are set in the Notification of the National Telecommunications Commission Re: Telecommunications Network Access and Interconnection B.E. 2549 (2006).

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

Licensees with their own telecommunications network are required to provide Reference Access Offers and Reference Interconnection Offers, with respect to access or interconnection by other licensees.

Licensees must also prepare information on the calculation of charges for network access, interconnection, and unbundled components. This information is submitted at the time of licence application, and is subject to consideration by the NBTC.

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

Standards and pricing methodologies are set by the NBTC in the Notification of the National Telecommunications Commission Re: Standards for Calculation of Interconnection Charges.

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

Reasonable access or interconnection charges are calculated only for each network element used in providing the given service. Other expenses not directly relating thereto are not included in the calculation. If licensees do not base their calculation of remuneration rates on costs of unbundled network access or interconnection, or if the NBTC considers the charges unreasonable or excessive, the NBTC has the authority to order such licensees to formulate steps and plans for restructuring their charges, and to submit them for the NBTC's approval, on a case-by-case basis, within a specified period of time. The NBTC has the authority to regulate each step of the procedure, and/or to determine network access or interconnection charges that it deems appropriate.

#### 2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

According to the Notification of the National Telecommunications Commission Re: Telecommunications Network Access and Interconnection B.E. 2549 (2006), licensees with their own telecommunications networks must provide unbundling network elements and interconnection according to the criteria, conditions, and procedures prescribed by the NBTC.

The NBTC has the authority to prescribe, by announcement, the particular network elements that it deems necessary for provision of network access and interconnection, and that licensees must make available on an unbundled basis. The regulations provide a general

listing of 'necessary' network elements, but the NBTC has the authority to appoint a subcommittee to deliberate in greater detail.

The initial listing includes:

1. Local subscriber loops.
2. Local switch and transmission equipment.
3. Local trunks.
4. Toll switching and transmission equipment.
5. Long distance trunks.
6. International switching and transmission equipment.
7. Network interface equipment.
8. Directory equipment and services.
9. Network signaling equipment.

Unless the NBTC requires otherwise, charges for unbundled elements would be as negotiated among the parties and agreed by contract, but these would need to be calculated on the basis of actual costs.

#### 2.15 How are existing interconnection and access regulatory conditions to be applied to next generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

At the moment, these offerings are quite limited. For now, they would be subject to regulation in the same way as other telecommunications services.

### Price and Consumer Regulation

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

The Notification of the National Telecommunications Commission Re: Maximum Rate of Service Fee and Advance Service Fee Collection in Telecommunications Business B.E. 2549 (2006), sets out the criteria for determining the maximum pricing for certain services.

#### 2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

The NBTC requires licensees to offer services in compliance with standards set by the NBTC. These standards address technical issues, service contracts, tariffs, service charges, as well as protection of consumer rights in the areas of personal data, privacy, and freedom of communication via telecommunication networks. The standards are meant to provide services on a fair and equitable basis for both licensees and users. During the implementation of these standards, the NBTC (or its predecessor) issued several notifications concerning the protection of service users, which have been published in the Royal Government Gazette in order to become effective under various laws. This includes procedures for receiving and considering user complaints, the establishment of the Telecommunications Consumer Protection Institute, and the 1200 Call Centre, which were implemented to protect the rights of consumers and to enhance their bargaining power and awareness in these areas.

In addition, the NBTC also requires that licensees establish separate call centres to settle disputes and pursue solutions to user complaints at no additional charge. These centres have been

established by operators providing fixed-line, mobile, internet, and payphone services. Thus, service users with issues relating to false tariffs, charges inconsistent with actual usage, services inconsistent with advertisements, or those who wish to terminate their contracts due to poor quality of services or 'unfair' treatment, can now seek assistance in this way.

Following the receipt of a complaint, there is an escalation process for pursuing resolution within particular deadlines.

## Numbering

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

Telephone numbers and 'special codes' are allocated by the NBTC, in accordance with regulations promulgated for this purpose.

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

There are multiple regulations governing the use of telephone numbers, among them:

1. The Notification of the NTC on Criteria for Use of International Access Numbers with Service Codes.
2. The Notification of the NTC on Additional Temporary Criteria for Telecommunication Numbering Allocation (No. 2) and Alteration in Telecommunication Numbers for Mobile Telephone Service from 9 Digits to 10 Digits.
3. The Notification of the NTC on Telecommunications Numbering Plan.
4. The Notification of the NTC on Temporary Criteria for Telecommunication Numbering Allocation.
5. The Notification of the NTC on Criteria for the Assignment and Permission of Special Telecommunications Numbers.

### 2.20 What are the basic rules applicable to the 'porting' (i.e. transfer) of telephone numbers (fixed and mobile)?

The rules for porting are addressed in the Notification of the National Telecommunications Commission Re: Criteria for Mobile Number Portability. The basic approach is that service users have the right to mobile number portability, and service providers are prohibited from taking any action that obstructs or impedes the porting of mobile numbers to other service providers. The notification contains significant additional detail.

## 3 Radio Spectrum

### 3.1 Is the use of radio spectrum specifically regulated and if so, by which authority?

The use of radio frequency spectrum is specifically regulated, and the NBTC is the primary regulator.

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

Radio frequency spectrum is allocated pursuant to the 2010 Frequency Allocation Act. It provides for the NBTC to consider and grant permits for use of frequency waves by tender, according

to the procedures, means, terms, and conditions the NBTC may set. It also states that money obtained from the tender, after deductions for certain costs and expenses, shall vest in the state.

The application to obtain a permit to use frequency waves is deemed to be an application for the operation of a telecommunication business, pursuant to the Telecommunications Business Operation Act. When the NBTC grants a permit to use particular frequency waves, it is deemed that a telecommunications business licence is also granted. This permit would also automatically include approval to possess and use radio communication equipment to establish radio communications stations, but only as specified in the application.

### 3.3 Are distinctions made between mobile, fixed and satellite usage in the grant of spectrum rights?

Spectrum rights are assigned for particular categories of usage.

### 3.4 How is the installation of satellite earth stations and their use for up-linking and down-linking regulated?

A satellite communication business is regulated as a telecommunications service and requires a Type 3 licence.

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

A licence is always necessary to operate a telecommunications business using spectrum.

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

In a spectrum auction, fees would be determined according to the terms of the auction. However, the NBTC also has the power to prescribe periodic fees applicable to each licensee. These must be based on cost-effective supervision by the NBTC, and may not exceed 2% of the licensee's revenue, before expenses. Such fees vest in the NBTC.

### 3.7 Are spectrum licences able to be traded or sub-licensed and if so on what conditions?

According to Section 46 of the 2010 Frequency Allocation Act, a permit to use frequency waves for a telecommunication business is the exclusive right of the permit holder and is not transferable. The holder of a permit to use particular frequencies for a telecommunication business must operate the business by themselves. The permit holder cannot assign business management, in whole or in part, to someone else, or authorise other persons to operate the business on its behalf.

## 4 Data Retention and Interception

### 4.1 Are operators obliged to retain any call data? If so who is obliged to retain what and for how long?

Licensed telecommunications service providers must retain certain personal data of telecommunications users, including the facts and details concerning each service user by which the service user can be identified, service usage data, telecommunication numbers, and

descriptions of individual usage. Licensees must keep personal data of their service users for the last three months and in the event that the service is terminated, to retain this data for three months following the date of termination of the service. “In the case of necessity”, the service provider may be required to retain the data for longer than three months after termination of service, but not for longer than two years.

#### 4.2 Are operators obliged to maintain call interception (wire-tap) capabilities?

Telecommunications licensees are not under licence conditions to build their networks in a manner that enables interception or provides back doors. There is already a regulatory framework in place by which such conditions could be imposed, if such a policy decision were made.

### 5 Distribution of Audio-Visual Media

#### 5.1 How is the distribution of audio-visual media regulated in Thailand?

Distribution of television is handled pursuant to the Broadcasting Business Act, with the NBTC as the primary regulator. Other forms of media, such as movies and computer games, are regulated under different laws.

#### 5.2 Is there a distinction between the linear and non-linear content and/or content distributed over different platforms?

At this stage, the distinction between linear vs. non-linear media is not relevant to the regulatory regime. However, for practical purposes, television — the primary audio-visual media of concern — is virtually all linear, anyway. Note that IPTV is not subject to regulation under the Broadcasting Business Act.

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

Broadcast licences are issued for broadcasts using frequencies (e.g. free-to-air) and not using frequencies (e.g. cable). For broadcasts using frequencies, there are multiple categories of licences for public and community broadcasting, but these are available only to government entities, and certain associations, foundations, charities, and educational institutions. With respect to commercial services, these can be licensed at the national, local, or regional level. There is a separate licence available to broadcast without using frequencies. For commercial services, foreign shareholding in the licensee is limited to 25%. Other regulatory requirements deal with the directorship of companies holding the licences, i.e. that at least 75% of the directors be Thai nationals, and provide a mechanism by which obligations can be imposed through licence conditions.

### 6 Internet Infrastructure

#### 6.1 Are conveyance services over the internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the internet at a wholesale (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?

Internet access providers (both wholesale and retail) are subject to regulation by the NBTC. The MICT (including the National Information Technology Committee and the National Electronics and Computer Technology Centre) also has a significant role.

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

According to the Computer Crime Act, any service provider *intentionally supporting or consenting to an offence* within a computer system under their control is subject to the same penalty as that imposed upon the person committing the offence.

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

Counter-infringement measures have been considered by a committee that has been established by the MICT. Specifically, the committee has proposed adding the word “copies” to Section 9 of the Computer Crimes Act so as to expand the section to cover the crime of copying IP owners’ data on websites, and thus to provide for the application of penalties stated in that section of the Act. The committee has also advocated the amendment of Section 20 to allow the blocking of infringing websites. It would also like to see the Act amended to clearly state that the officers charged with enforcing the Computer Crimes Act also have the power to block the distribution of computer data relevant to such offences.

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

According to the Notification of the National Telecommunications Commission Re: Criteria and Procedures for Internet Service Licence Applications, licensees have a general obligation to operate their telecommunications network services and provide services to service users and interconnection users on a non-discriminatory basis.

#### 6.5 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?

Pursuant to the Computer Crimes Act, following the issuance of a court order, a competent official under the Computer Crimes Act may block particular website(s) or other content, or order ISP(s) to do so.

### 6.6 How are 'voice over IP' services regulated?

VOIP services are regulated as an internet service under multiple regulatory notifications. Among them are the Notification of the National Telecommunications Commission Re: Provision of Voice over Internet Protocol (VoIP) Service Using Telephone Numbers, the Notification of the National Telecommunications Commission Re: Voice over Internet Protocol (VoIP) Service, and the Notification of the National Telecommunications Commission Re: Service Standard for Voice over Internet Protocol (or Internet Telephony).



**David Duncan**

Tilleke & Gibbins  
Supalai Grand Tower, 26th Floor  
1011 Rama 3 Road, Chongnonsi  
Yannawa, Bangkok 10120  
Thailand

Tel: +66 2 653 5555  
Fax: +66 2 653 5678  
Email: david.d@tilleke.com  
URL: www.tilleke.com

David Duncan is a consultant in the Tilleke & Gibbins corporate and commercial group, specialising in complex international transactions. He focuses on new economy business sectors, including technology, media, and telecommunications, but works with a full spectrum of clients in other industries, as well. A significant component of David's practice consists of competition law, also quite relevant to the TMT sector. The 2012 edition of *Chambers Asia-Pacific* notes that David is a key member of the Tilleke & Gibbins projects team.

## Tilleke & Gibbins

Tilleke & Gibbins is a leading regional law firm with over 100 lawyers practicing in Bangkok, Hanoi, and Ho Chi Minh City. We help cutting-edge players in the high-technology, multimedia, and telecommunications industries shape and succeed in the creative economies of Southeast Asia. The firm specialises in defining strategic and business objectives, negotiating contracts, managing disputes, and capitalising on technology acquisitions and capabilities to create new market opportunities.

Members of the firm's Technology, Media, and Telecommunications (TMT) team are experienced in representing high-profile clients in Silicon Valley and Hollywood, and now lead in Southeast Asia's TMT sector. Clients include new economy businesses in the fields of satellite direct-to-home (DTH) pay television broadcasting, cable and IPTV, telecommunications, mobile technology and infrastructure providers, computer hardware and software vendors, semiconductor firms, motion picture producers, and special effects companies, Internet service providers, and satellite operators.

Tilleke & Gibbins' TMT group and the intellectual property (IP) group work in tandem to protect innovation, including ensuring the clearance and licensing of intellectual property as it relates to film, television, radio, and Internet content. Both our TMT and IP groups are recognised as leading practices by publications such as *The Legal 500 Asia Pacific*.

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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

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