

Telecoms and Media

An overview of regulation
in 48 jurisdictions worldwide

2011

Contributing editors: Laurent Garzaniti and Natasha Good



Published by
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Telecoms and Media 2011

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Telecoms and Media 2011

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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ISSN 1471-0447

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accurate as of April 2011, be advised that
this is a developing area.

Printed and distributed by Encompass

Print Solutions
Tel: 0844 2480 112

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Portugal

Jaime Medeiros and Mónica Oliveira Costa

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Communications policy

1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymaking procedure? Has the EU regulatory framework (including the market reviews) been fully transposed into your national law, as far as currently required?

Portugal has two independent regulators, one for the telecoms sector and another for the media sector.

Autoridade Nacional de Comunicações (Anacom) is the national regulatory authority (NRA) for the communications sector, invested with regulatory, supervisory and representative powers. Its main areas of intervention are:

- electronic communications networks;
- electronic communications services;
- radio communications services;
- the postal network;
- radio and telecommunications terminal equipment (R&TTE);
- infrastructures for telecommunications in buildings (ITED); and
- some aspects of information society services, namely e-commerce.

The telecoms policy is handled by the Ministry of Public Works, Transport and Communications, but it is incumbent upon the NRA to assist the government in the policymaking process, to elaborate regulations and to coordinate with the competition regulator effective competition for the telecom sector.

The NRA is also entrusted with some powers to arbitrate and to resolve disputes that arise in the context of communications. Such powers are controversial among practitioners.

Law No. 5/2004 of 10 February (as subsequently amended) is the main act regarding electronic communications. It establishes the legal regime applicable to electronic communications networks and services and to associated services, and defines the assignment of the NRA in this field.

In the field of e-commerce, the main act is Decree-Law No. 7/2004 of 7 January (as subsequently amended), which transposed into the Portuguese legal system Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.

The EU regulatory framework is fully transposed. Exception is made to Directive 2009/136/EC (Citizens' Rights Directive) and Directive 2009/140/EC (Better Regulation Directive), which adoption is still pending.

The media sector is regulated by the independent regulator Entidade Reguladora para a Comunicação Social (ERC). It is important to note that the exclusive competence of ERC is restricted to the activity of media companies from the perspective of freedom of speech and the content of media. Sound radio television broadcasting

and the management of the spectrum is under Anacom regulation and supervision.

In the media sector, the main acts are the Radio Law (Law No. 54/2010 of 24 December concerning access to and pursuit of radio broadcasting activity in the national territory) and the Television Act (Law No. 27/2007 of 30 July, which regulates access to and performance of television activity), amended by Law No. 8/2011 of 11 April, which transposed Directive 2007/65/EC and entered in force on 11 May.

During 2011 and 2012 the analogue-digital transition process will be implemented and terrestrial digital television (TDT) will be introduced, according to Resolution No. 26/2009 of 17 March.

2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

In 2001, the government defined strategic guidelines for the development of the audiovisual and telecommunications sectors in the context of technological convergence, through the Joint Ministerial Order No. 863/2001 of 14 September. However, since then no amendments have been made to regulation concerning convergence.

There are no legal definitions for 'telecoms' and 'media'.

3 Broadcasting sector

Is broadcasting regulated separately from telecoms? If so, how?

Broadcasters are subject to both regulators, Anacom and ERC. ERC is the media regulatory body (broadcasting sector, in particular content issues). ERC is responsible for licensing of television and radio terrestrial broadcasting channels; licensing of the 'distributive operator', the entity responsible for the selection and aggregation of television programme services; and granting permits for TV and radio channels distributed by cable. On the other hand, Anacom assures the radio spectrum management, including planning, the assignment of spectrum resources and their supervision.

Telecoms regulation – general

4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

Portugal, as a member of the EU, has committed to the WTO Basic Telecommunications Agreement. Currently, there are no exceptions in force.

5 Public/private ownership

What proportion of any telecoms operator is owned by the state or private enterprise?

The government still has a golden share, with certain veto rights attached, in the incumbent operator, Portugal Telecom. On 8 July 2010, the European Court of Justice ruled that the Portuguese state's holding of golden shares in Portugal Telecom constitutes an unjustified restriction on the free movement of capital, since it grants the Portuguese state influence over decision-making in the company, which is liable to discourage investments from operators in other member states. This veto right was used for the first time in September 2010 to veto the offer submitted by Telefónica for the acquisition of Portugal Telecom SGPS SA's stake in Brasilcel NV. Recently, the Portuguese government has presented to the European Commission a proposal to comply with the ECJ ruling.

6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide telecoms services?

There are no foreign ownership restrictions concerning telecoms services.

7 Fixed, mobile and satellite services

Comparatively, how are fixed, mobile and satellite services regulated? Under what conditions may public telephone services be provided?

The general principle, common to all forms of electronic communications including the public telephone service, is free market access by legal persons that is subject only to the regime of prior notification pursuant to the regime set out in the EU regulatory package.

The notification shall include full details of the identification of the undertaking, a description of the network or service to be provided and the estimated launching date. The undertaking can commence the activity upon notification.

Exceptions to this general rule are individual rights of use for numbering and spectrum allocation. Such individual rights of use are subject to allocation and assignment.

The NRA publishes the national frequency allocation plan (NFAP) on an annual basis according to the criteria of availability of radio spectrum, effective competition in the relevant markets and effective and efficient use of frequencies.

The NRA is also responsible for overseeing the national numbering plan.

Public telephone service providers are subject to certain obligations regarding:

- information to the public;
- mandatory contractual provisions;
- the integrity of the network;
- directory enquiry services and operator assistance services; and
- access to the emergency services.

It is incumbent upon the government, following a public tender, to designate the operator responsible for the provision of the universal service.

8 Satellite facilities and submarine cables

In addition to the requirements under question 7, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

There are no specific rules for the operation of satellite earth station facilities. The use of the radio spectrum by maritime mobile and satellite mobile maritime services radiocommunication stations is ruled by Decree-Law No. 179/97 of 24 July.

The landing of submarine cables is not subject to specific telecoms rules.

9 Universal service obligations and financing

Are there any universal service obligations? How is provision of these services financed?

In adopting the Universal Service Directive, the Electronic Communications Law defined a minimum set of services to be made available as universal service and users' rights relating to electronic communications networks and services. Such minimum set of services include connection and access to telephone services at a fixed location, access to a telephone directory and adequate offer of public pay telephones at accessible prices.

NGNs and new technologies are not included in the legal definition of universal service. However, the government's strategic guidelines for the development and investment on next generation networks (approved by Resolution No. 120/2008) include an active participation in the deployment of NGA, both through investment subsidies and by investing directly, particularly in rural and more remote regions.

Financing of the universal service is subject to an assessment of the NRA on whether the provision of such service may be considered 'an excessive burden'.

By Determination of 27 January 2011, the NRA has preliminarily approved the definition of the concept of excessive burden and the methodology for calculating the net costs of US of telecommunications. Such definition and methodology is currently submitted to public consultation.

10 Operator exclusivity and limits on licence numbers

Are there any services granted exclusively to one operator or for which there are only a limited number of licences? If so, how long do such entitlements last?

The relevant markets are fully liberalised.

11 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

From a telecoms regulation perspective, no. However, the separation between network and service activities can be envisaged or imposed from a competition regulation perspective. In the case of a merger control, both the NRA and the competition regulator have powers to impose conditions and obligations in respect to undertakings.

12 Number portability

Is number portability across networks possible? If so, is it obligatory?

All subscribers of publicly available telephone services (fixed or mobile) are entitled to number portability in respect of the same service. The portability window has a maximum period of three hours, during which interruption to the service may occur. The NRA has issued the Portability Regulation No. 58/2005 of 18 August (subsequently amended).

Portability between mobile operators must be completed within three working days. Failure to meet this deadline gives the subscriber the right to a compensation of €2.50 per number and per day.

There are no maximum deadlines for portability between fixed telephone operators but a best practice of two working days period is expected to be accomplished.

It is incumbent upon the NRA to monitor and supervise retail prices charged to subscribers for portability operations so as to ensure that such prices do not discourage subscribers who wish to benefit from portability.

13 Authorisation timescale

Are licences or other authorisations required? How long does the licensing authority take to grant such licences or authorisations?

Except for the allocation of spectrum and use of numbering, no licensing or authorisation is required.

The decision on the allocation of numbering for specific purposes within the national numbering plan shall be taken within 15 days (subject to an eventual 15 days extension if subject to competitive or comparative procedures).

The allocation of frequencies for specific purposes within the national frequency allocation plan (NFAP) is subject to a 30-day period, eventually extended up to a maximum of eight months whenever it is necessary to proceed with selection procedures in order to ensure competition, reasonableness and transparency.

14 Licence duration

What is the normal duration of licences?

Individual rights of usage are valid for 15 years, renewed for equal periods upon request.

15 Fees

What fees are payable for each type of authorisation?

The fees are determined according to the administrative costs incurred by the NRA and should be objectively justified, transparent, non-discriminatory and proportionate in relation to regulation objectives pursued. They are approved by the Ministry for Public Works, Transport and Communications.

According to Administrative Rule No. 1473-B/2008, as amended, the following fees are due:

- fees for the issue of statements and for the granting of rights of use for frequencies and numbers;
- annual fees for the provision of electronic communications networks and services, calculated based on the amount of relevant revenues of the operators;
- annual fees due for the use of numbers;
- radio fees;
- fees due for the installation of telecommunication infrastructures in buildings;
- fees due for access to and provision of audio-text services; and
- fees due for access to and provision of postal services.

Such fees represented to the NRA in 2009 (according to the last available figures) an income of €72.2 million (€11 million in annual activity fees, €60.6 million in fees for the use of frequencies, €620,000 in fees for the use of numbers and €12,800 in fees for awarded declarations and rights).

16 Modification and assignment of licence

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

Usage of rights for numbers and for frequencies are transferable upon prior notification to the NRA. The NRA may oppose the transfer or impose conditions, namely in order to avoid distortion of competition. In this case, the Competition Authority shall give a prior opinion.

Licences cannot be pledged.

17 Retail tariffs

Are national retail tariffs regulated? If so, which operators' tariffs are regulated and how?

As a general rule, retail tariffs are not regulated.

However, operators with a dominant position may be subject to the obligation of cost orientation of prices. In such cases, the NRA

may require the operator to provide full justification for its prices and may require such prices to be adjusted. The NRA also has competence to regulate universal service tariffs in order to guarantee affordable access.

18 Customer terms and conditions

Must customer terms and conditions be filed with, or approved by, the regulator or other body? Are customer terms and conditions subject to specific rules?

In 2005 and more recently in December 2008, the NRA issued guidelines with minimum content of adhesion contracts.

Operators have to submit all standard contracts with customers to the approval of the NRA. The NRA then makes public such standard contracts on its website.

19 Next-generation networks

How are next-generation networks (NGN) regulated?

The government's strategic guidelines for the development and investment on next generation networks were approved by Resolution No. 120/2008. Such guidelines include an active participation of the government and local authorities in the deployment of NGA, both through investment subsidies and by investing directly, particularly in rural and more remote regions. The guidelines also foresee the non-discriminatory principle for access to ducts and other infrastructures, the provision for technical standards on infrastructures for telecommunications in housing developments, urban settlements and concentrations of buildings (ITUR) and the adoption of solutions aimed at eliminating or reducing vertical barriers to the roll-out of fibre optics, so as to prevent the first operator from monopolising access to buildings.

Further to these guidelines, Decree-Law No. 123/2009 of 21 May, concerning the construction of infrastructures suitable for the accommodation of electronic communications networks, the set up of electronic communications networks and the construction of infrastructures for telecommunications in housing developments, urban settlements and concentrations of buildings, was approved.

20 Changes to telecoms law

Are any major changes planned to the telecoms laws?

The adoption of Directive 2009/136/EC (Citizens' Rights Directive) and Directive 2009/140/EC (Better Regulation Directive) is expected to occur during 2011.

Telecoms regulation – mobile**21 Radio frequency (RF) requirements**

For wireless services, are radio frequency (RF) licences required in addition to telecoms services authorisations and are they available on a competitive or non-competitive basis? How are RF licences allocated? Do RF licences restrict the use of the licensed spectrum?

The use of radio communications networks and stations is subject to licensing and payment of fees. The licensing procedure is rule by Decree-Law No. 151A/2000 of 20 July (as further amended).

Frequencies are allocated according to availability of spectrum, effectiveness and efficiency of use and in respect of fair and effective competition.

The number of usage rights may only be limited in order to ensure the efficient use of radio frequencies. The last auction for the granting of frequencies rights of use for broadband wireless access was announced for public consultation on 17 March 2011.

The NRA may, at any time and upon reasonable compensation, alter, cancel or replace the allocation of frequencies for the operation and use of radio communications networks and stations, within

the scope of the management of the radio spectrum and in accordance with the principle of proportionality and respect for established rights.

22 Radio spectrum

Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

There is no specific regulation regarding refarming. The NRA publishes annually the NFAP. When appropriate, such NFAP may contain provisions for refarming, as occurred with the 2007 NFAP for 900MHz bands. By Determination of 8 July 2010 the NRA decided, in the context of the 900/1800MHz spectrum refarming, to unify into a single title the conditions applicable to the exercise of the rights of use of frequencies allocated to Optimus, TMN and to Vodafone Portugal for the provision of the land mobile service, in accordance with GSM 900/1800 and UMTS technologies.

The permitted use is always mentioned in RF licenses.

23 Spectrum trading

Is licensed RF spectrum tradable?

Frequency usage rights are transferable upon prior notification to the NRA. The NRA may oppose the transfer or impose conditions, namely in order to avoid distortion of competition. In this case, the Competition Authority shall give a prior opinion.

24 Mobile virtual network operator (MVNO) and national roaming traffic

Are any mobile network operators expressly obliged to carry MVNO or national roaming traffic?

In February 2007 the NRA approved the regulatory framework of MVNO. Currently it is not mandatory for any mobile network operator to carry MVNO but that may change in the future according to wholesale market analysis.

Mobile operators are free to negotiate national roaming agreements. Whenever operators fail to reach national roaming agreements, the NRA is entitled to impose obligations in order to assure suitable access and interconnection. The NRA is also entrusted with powers to resolve disputes among operators regarding national roaming.

25 Mobile call termination

Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Is call termination regulated, and, if so, how?

The NRA has adopted the calling party pays principle. On 7 May 2009, the European Commission published a recommendation on the regulatory treatment of fixed and mobile termination rates in the European Union proposing the adoption, by no later than 31 December 2012, of symmetrical termination rates based on the costs of an efficient operator, expecting that mobile termination rates will range between 1.5 and 3 cents per minute, which will mean gains of at least €2 billion in the European Union in the period 2009-2012.

Following such recommendation, and upon an analysis of the market, the NRA issued in May 2010 a decision fixing maximum termination rates for voice calls on mobile networks to be applied by the three mobile operators with significant market power, irrespective of the origin of the call, with per second billing from the first second.

26 International mobile roaming

Are wholesale and retail charges for international mobile roaming regulated?

Yes, according to Regulation (EC) No. 717/2007, as amended by Regulation (EC) No. 544/2009.

27 Next-generation mobile services

Is there any regulation for the roll-out of 3G, 3.5G or 4G mobile services?

Not yet.

Telecoms regulation – fixed infrastructure

28 Cable networks

Is ownership of cable networks, in particular by telecoms operators, restricted?

No, there are no ownership restrictions.

29 Local loop

Is there any specific rule regarding access to the local loop or local loop unbundling? What type of local loop is covered?

The incumbent operator, Portugal Telecom, is subject to the obligation to offer unbundled access to twisted copper pair circuit local loops.

By Determination of 15 July 2009, the NRA approved a decision on the synchronism between number portability and local loop unbundling.

The last amendments to the reference unbundling offer were imposed by the NRA through the Determination of 7 February 2010, including references to SLAs and compensation for failure.

30 Interconnection and access

How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? Are wholesale access services regulated, and, if so, how?

The general principle is that operators are free to negotiate between themselves access and interconnection arrangements; operators have an obligation to negotiate upon request; and the NRA is entrusted with powers to encourage and ensure suitable access and interconnection.

The NRA imposes obligations whenever necessary and may intervene on its own or by request of an operator.

Conditions of the reference interconnection offer applying to the incumbent Portugal Telecom during 2010 were approved by the ANR in July 2010.

Wholesale services are regulated. The NRA has concluded up to 2010 the analysis of markets 4, 5 and 6 of Recommendation 2007/879/EC of 17 December 2007 (Market 4 – Wholesale network infrastructure access at a fixed location, Market 5 – Wholesale broadband access and Market 6 – Wholesale terminating segments of leased lines).

Telecoms regulation – internet services

31 Internet services

How are internet services, including voice over the internet, regulated?

The activity of an internet service provider is not subject to prior authorisation. However, intermediary networking service providers have to proceed with a prior notification before the NRA, as any other electronic telecommunications provider.

Internet services are regulated by the Electronic Communications Law and by Decree-Law No. 7/2004 (the E-Commerce Law).

The guidelines issued by the NRA on VoIP are dated 2006. At that time, the NRA created a new 30 number range in the national numbering plan to accommodate nomadic voice over internet protocol (VoIP) numbers. By Determination of 30 July 2010, the NRA approved a new public consultation document on the implementation of the common position taken by the European Regulators Group, approved in December 2007, on VoIP and conditions for use of geographic, nomadic and mobile numbers. The report is expected to be concluded in 2011.

32 Internet service provision

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers?

Online intermediary service providers are not under the general obligation to monitor the information that they transmit or store, or to investigate possible offences practised within their scope. However, they are obligated to the NRA to:

- inform when they become aware of illegal activities undertaken via services rendered;
- identify recipients of their services with whom they have entered into storage agreements;
- comply promptly with instructions aiming to terminate or prevent an offence, namely to remove or disable access to given information; and
- supply lists of owners of hosted websites, where requested.

The NRA and the courts are entitled to apply restrictive measures to internet service providers in cases of damages or threaten of damages to human dignity or public policy, public health, public security and consumers, including investors.

33 Financing of broadband and NGA networks

Is there a government financial scheme to promote broadband penetration?

As mentioned above, the government approved strategic guidelines for the development and investment on next generation networks (Resolution No. 120/2008).

Following such guideline, the government also approved Administrative Rule No. 829/2010 of 31 August, which lays down the regime implementing measure No. 3.6, 'Deployment of Next Generation Broadband Networks in Rural Areas', integrated into sub-programme No. 3, 'Dynamising Rural Areas', of the Programme for the Rural Development of Mainland Portugal (PRODER).

Such regime regulates the support (as a non-reimbursable subsidy) to operations for the set up of high-speed electronic communications networks in rural areas, namely set up of:

- infrastructures for next generation broadband network and respective access, including means of transmission (backhaul), point of presence and equipment;
- broadband telecommunications equipment, hardware and software and control and monitoring systems; and
- passive infrastructures for next generation broadband networks, such as civil engineering works like ducts and masts, and other network elements, like dark fibre and passive equipment, in synergy with other infrastructures, power, transport, water, sewerage networks, among others, or improvement of existing broadband infrastructure.

Media regulation

34 Ownership restrictions

Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?

There are no restrictions regarding foreign investment in broadcasting activities and the basic principle of regulation is transparency.

The Television Act has recently been amended (Law No. 8/2011 of 11 April) and a new Radio Law came into force in December 2010 (Law No. 54/2010 of 24 December).

According to the transparency principle:

- the shares of a public limited company must be registered shares;
- ownership must be notified to the NRA;
- there should be public disclosure whenever there is a variation in the capital stock that meets 5 per cent, 10 per cent, 20 per cent, 30 per cent, 40 per cent or 50 per cent of the share capital or of votes or a change in the control; and
- radio operators should disclose the full chain of entities holding at least 5 per cent shares and shares held by shareholders in other media bodies.

Any change in the relationship of control of broadcasting operators is subject to authorisation of the NRA and may only take place three years after the original licence is issued, two years after the approved project is altered or one year after the last renewal.

The above restrictions do not apply to radio broadcasting activity exclusively through the internet.

With the exception of the public radio and television service legally foreseen, the broadcasting activity or its financing is interdicted to public entities, political parties, trade unions or employer or professional associations. Exception is made for teaching, institutional or scientific contents exclusively performed through the internet.

Broadcasters are subject to the general regime of defence and promotion of competition, particularly with regard to prohibited practices, to the abuse of a dominant position and to concentration of companies. Concentrations are subject to prior opinion of the NRA, which will be binding from the perspective of freedom of speech.

35 Cross-ownership

Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers? Is there any suggestion of change to regulation of such cross-ownership given the emergence of 'new media' platforms?

Television

An undertaking cannot have direct or indirect control of more than 50 per cent of the licences of television programme services for free, unrestricted access nationwide over the total number of licences given to services of similar contents in the same area of coverage.

Television operators are bound to assure a 10 per cent transmission time of independent productions. In order to implement such minimum quota, television operators cannot own more than 25 per cent of the capital stock of independent producers.

Radio

There are some restrictions regarding the number of licences, frequencies and the scope of the programme services. An undertaking cannot have the control of two or more radio operators with licences exceeding 10 per cent of all licences granted on national territory, 50 per cent of programme services qualified for the same coverage area and for the same frequency band or 50 per cent of programme services of the same scope qualified for the same district, metropolitan area, municipality, or, in the autonomous regions, in the same island.

The above restrictions do not apply to radio broadcasting activity exclusively through the internet.

Press and other media

There are no specific restrictions regarding cross-ownership other than those referred to above.

36 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Television

Licences to broadcast using the terrestrial spectrum are subject to public tenders. There can be public tenders for unrestricted free-to-air television programme services and for conditional access television programme services or free-to-air television programme services subject to a subscription. The NRA for media has 45 days counting from closing of tender to issue its decision and fees payable to the NRA are around €286,500 for national broadcast, €45,800 for regional broadcast and €11,500 for local broadcast.

If the proposed broadcasting activity does not use the terrestrial spectrum, authorisation is given upon the request of interested undertakings. The NRA for media shall decide within 15 days and the fee payable is around €28,700.

Television operators shall start broadcasting licensed or authorised television programme services within 12 months from the date the corresponding qualifying documents are granted.

Illegal television activity is considered a crime subject to a term of imprisonment of up to three years or to a daily pecuniary sanction for up to 320 days.

Radio

Access to radio broadcasting activity shall be conditional upon issue of a licence, by means of public tender, or of an authorisation, according to whether programme services to be provided use or do not use the terrestrial broadcast spectrum, under the NFAP.

Fees payable to the NRA are around €28,700 for national broadcast, €11,400 for regional broadcast and €5,700 for local broadcast for a license and €4,000 for an authorisation.

Radio broadcasting activity consisting in the broadcast of programme services exclusively through the internet does not require prior qualification, being subject only to registration.

Illegal radio activity is considered a crime subject to a term of imprisonment of up to three years or to a daily pecuniary sanction for up to 320 days.

37 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media are outside of this regime?

Television

As a general principle, television broadcasting is based on the freedom of programming and neither the public administration nor any sovereign body, with the exception of the courts of law, may prevent, limit or impose the broadcast of any programmes.

However, there are some restrictions foreseen in the law regarding the protection of Portuguese language and European productions.

Television operators who operate television programme services with national coverage are deemed to reserve for European works a majority proportion of their transmission time, to devote at least 50 per cent of their broadcasts to the broadcast of original Portuguese language programmes and to reserve at least 20 per cent of their transmission time to creative programmes originally produced in Portuguese, all excluding the time reserved for advertising, teleshopping and teletext services.

Radio

The music programming of radio programme services must include a minimum quota ranging from 25 per cent to 40 per cent of

Portuguese music. Such quota must include at least 60 per cent of music composed or performed in Portuguese by citizens of member states of the European Union and at least 35 per cent of music must be the first phonographic edition.

The NRA may exempt from these minimum quotas thematic music programme services based on the broadcasting of music genres insufficiently produced in Portugal.

38 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast media advertising is regulated by the Advertising Code (Decree-Law No. 330/90 of 23 October) as well as the Act concerning unfair business-to-consumer commercial practices (Decree-Law No. 57/2008 of 26 March, which transposed Directive 2005/29 of the European Parliament and of the Council of 11 May). In addition, the advertising rules foreseen in the Television Act (Law No. 27/2007, 30 July) and the Radio Act will apply whenever the advertising is broadcasted by television or radio.

Television

The amount of spot advertising and teleshopping between two-hour periods shall not exceed 10 per cent or 20 per cent, according to whether conditional access television programme services or free-to-air television programme services, unrestricted or subject to a subscription, are concerned.

From the limits mentioned above shall be excluded announcements made by television operators in connection with their own programmes and ancillary products directly derived from those programmes, and also public service or public interest announcements and humanitarian appeals broadcast free of charge, as well as the identification of sponsorships.

Television advertising and teleshopping must be easily identified and clearly separate from the other programming, and their insertion shall not imply an increase of the sound compared to the other programming.

In addition, teleshopping in split screen is forbidden and the same applies to television advertising during the news, political information, interviews and debates as well as creative works, religious and children's programmes. Teleshopping is also forbidden during children's programmes, as well as during the 15 minutes before and after.

With the amendment to the Television Act of 11 April (Law No. 8/20011), films for cinema or television, political information, news and children's programmes can only be interrupted by television advertising and teleshopping once every 30 minutes. In the case of children's programmes, the 30-minute period only applies when the programme length exceeds 30 minutes.

Audiovisual commercial communications, sponsorship agreements, product placement and production props shall be allowed in line with the admissible terms and conditions foreseen in Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007.

Radio

The following special advertising rules apply:

- the inclusion of advertising shall not affect the integrity of programmes, and shall take account its breaks, duration and nature;
- the broadcasting of advertising material shall not exceed 20 per cent of the total licensed programme services airtime;
- sponsored programme slots must make explicit reference to this fact at the beginning of the programme;
- the contents and programming of a sponsored broadcast shall not be influenced by the sponsor in any way so as to affect the responsibility and editorial independence of the radio operator or respective heads;

- the contents of sponsored programmes shall not instigate the purchase or lease of goods or services from the sponsors or third parties, namely by making specific advertising references to such goods or services; and
- news services and current affairs programmes shall not be sponsored.

Online

Online advertising is also subject to the Advertising Code as well as the Act concerning unfair business-to-consumer commercial practices and to the E-commerce Act (Decree-Law No. 7/2004 of 7 January, which transposed Directive 2000/31 of the European Parliament and of the Council of 8 June).

Service providers shall permanently render online, in conditions that allow easy and direct access, complete identification particulars that include namely:

- name or trade name;
- the geographic address at which the service provider is established and the electronic mail address that allow him or her to be contacted directly;
- registration of the service provider with public registry offices and relevant registration numbers; and
- tax identification number.

In the event that the provider pursues an activity that is subject to a prior authorisation, information regarding the entity that granted such authorisation shall be rendered available.

In the event that the services provided involve costs to the recipients in addition to the telecommunication service costs, tax and delivery costs included, such costs are to be indicated clearly and prior to the use of the services.

Finally, advertising communications must be clearly identifiable, so that the following are easily understandable by a common recipient:

- the advertising nature, as soon as the message is presented at the terminal and in an ostensive manner;
- the advertiser; and
- promotional offers, such as discounts, premiums or gifts, and promotional competitions or games, as well as the conditions to which they are subject.

39 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

No, there are no specific regulations. Must-carry obligations are foreseen in the Electronic Communications Law and the NRA is entitled to impose such obligations whenever necessary to meet objectives of general interest. The NRA is subject to principles of reasonableness, transparency and non-discrimination and may determine appropriate remuneration in respect of imposed must-carry obligations.

40 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific rules for those services?

There are no planned changes to the broadcasting laws regarding mobile and digital convergence.

The broadcasting laws are going to be amended in order to comply with the Audiovisual Media Services Directive (Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010).

41 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is not subject to specific regulation.

42 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Council of Ministers Resolution No. 26/2009, published on 17 March, has determined the termination of terrestrial analogue television transmission in all parts of the national territory, occurring no later than 26 April 2012.

The NRA has already approved the detailed plan for the cessation of terrestrial analogue transmissions (switch-off plan), associated with the introduction of digital terrestrial television (DTT) in Portugal (Determination of 24 June 2010).

43 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multichannelling, high definition, data services)?

The NRA awarded frequency use rights, for the provision of the DTT service to which multiplexers are associated, to Portugal Telecom, the incumbent operator (Determinations of 9 December 2008 and 9 June 2009, following two public tenders). Portugal Telecom is bound to corresponding transport and broadcasting obligations towards the television operators and in this respect will remain subject to the regulation of the NRA.

Regulatory agencies

44 Regulatory agencies

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

The communication sector is subject to the regulation of two NRA. Anacom is the regulator for telecoms and the management of spectrum for sound radio television broadcasting, while ERC is the media regulator from the perspective of freedom of speech, the content of media and free competition of the market.

45 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

Both regulators are independent organisational and financial bodies and legally independent from the government and the undertakings.

In order to assure functional independence, directors of the regulators are subject to some ineligible conditions, are appointed for a five years mandate, can only be dismissed in specific circumstances and are subject to incompatibilities during two years after the termination of the mandate.

The board of directors of ERC is composed of five members, four appointed by the parliament and the fifth co-opted by them. The directors of Anacom are appointed by a resolution of the Council of Ministers upon proposal by the member of government responsible for communications.

46 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

Decisions of an administrative nature (eg, a decision to allocate rights of use for frequencies) are subject to administrative jurisdiction and can be challenged before the administrative courts.

The decisions, orders or other measures adopted by the NRA in the scope of breach proceedings (eg, a fine imposed to an operator for failure to comply with an order of the NRA) can be challenged before the judicial courts.

The decisions pronounced in the scope of resolving litigation among undertakings may be appealed to the administrative courts. However please note that the intervention of the NRA in the scope of resolving litigation it is not mandatory.

47 Interception and data protection

Do any special rules require operators to assist government in certain conditions to intercept telecommunications messages? Explain the interaction between interception and data protection and privacy laws.

Under Decree-Law No. 41/2004 of 18 August (which transposed Directive 2002/58/EC of the European Parliament and of the Council of 12 July), electronic communications networks and services providers shall ensure the inviolability of communications and related traffic data by means of a public communications network and publicly available electronic communications services.

Listening, tapping, storage or other kinds of interception or surveillance of communications and related traffic data by persons other than users is prohibited without the prior and explicit consent of the users concerned, except for cases provided for in law.

Thus, retention of data revealing the content of electronic communications is prohibited, without prejudice to:

- (i) legally authorised recording of communications and related traffic data, when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction, or of any other communication made in the scope of a business relationship, provided that the data holder has been informed thereof and given his or her consent thereto; and
- (ii) provisions laid down in penal procedure law on recording and interception of communications.

With regard to (i), the recording of communication and related traffic data must be previously authorised by the Portuguese Data Protection Authority (CNPD). Normally, CNPD authorises it provided that the following requirements are foreseen if:

- it is carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction;
- it is made in the scope of a business relationship;
- the data subject has been informed thereof;
- the data subject has given his or her consent thereto; and
- the purpose is considered adequate, relevant and not excessive in relation to the purpose for which the recording is made.

The operators' employees are also considered data subjects, and therefore their consent must also be collected and the recording of communications foreseen in their employment contract.

Both the operators' employees and customers must be previously informed of the recording and its purposes as well as about their access, rectification and object rights.

The retention period for recorded phone calls is 90 days.

The security measures to be adopted are:

- implementation of access to information according to the different user profiles, with distinct access and handling levels;
- implementation of passwords, which must be changed periodically;
- users' profiles must be updated and eliminated when the user no longer has access privileges;
- keeping of an audit record of access to sensitive data, access to which must be restricted; and
- data back-ups must only be accessible by the system administrator.

Update and trends

During 2011 and 2012 the analogue-digital transition process is going to be implemented and the introduction of the terrestrial digital television (TDT) will take place, according to Resolution No. 26/2009 of 17 March. The NRA has already approved the detailed plan for the switch-off (Determination of 24 June 2010).

The broadcasting laws are going to be amended in order to comply with the Audiovisual Media Services Directive.

With regard to (ii), the recording and interception of communications will be subject to a prior reasoned order of a judge and executed by the criminal police body.

48 Data retention and disclosure obligations

What are the obligations for operators and service providers to retain customer data? What are the corresponding disclosure obligations? Will they be compensated for their efforts?

Under Law No. 32/2008, 17 July (which transposed Directive 2006/24 of the European Parliament and of the Council of 15 March), operators and service providers shall retain the following categories of data:

- data necessary to trace and identify the source of a communication;
- data necessary to trace and identify the destination of a communication;
- data necessary to identify the date, time and duration of a communication;
- data necessary to identify the type of communication;
- data necessary to identify users' communication equipment or what purports to be their equipment; and
- data necessary to identify the location of mobile communication equipment.

Providers of publicly available electronic communications services or of public communications networks shall retain data provided for therein for a one-year-period from the date of the communication.

Providers of publicly available electronic communications services or of public communications networks shall:

- retain data concerning categories provided for above in such a way that they can be provided without undue delay to the competent authorities, by reasoned court order;
- ensure that the retained data are of the same quality and subject to the same security and protection as those data on the network;
- take all appropriate technical and organisational measures to protect the data provided for above against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful storage, processing, access or disclosure;
- take all appropriate technical and organisational measures to ensure that data provided for above are accessed by specially authorised personnel only; and
- destroy data at the end of the period of retention, except those that have been preserved by court order.

Data concerning categories provided for above, except for data on subscribers' names and addresses, shall be blocked as from the moment they are retained, and shall only be unblocked in order to be provided to competent authorities.

Providers of publicly available electronic communications services or of public communications networks shall submit exclusively by electronic means to CNPD the necessary elements to identify personnel specially authorised to access data; and prepare records of data retrieved and provided to the competent authorities and send them to CNPD on a quarterly basis.

49 Unsolicited communications

Does regulation prohibit unsolicited communications? Are there exceptions to the prohibition?

Decree-Law No. 7/2004 of 7 January (which transposed Directive 2000/31 of the European Parliament and of the Council of 8 June) protects recipients from unsolicited communications in general through a mixed system of opt-in for natural persons and opt-out for legal persons.

However, even if the recipient is a natural person, the unsolicited communication will be lawful by means of an opt-out option provided that:

- the operator obtained customers' e-mail contacts from them in the context of a previous transaction (sale of a product or service);
- this e-mail refers to the same or similar products or services previously rendered; and
- the operator had given an opt-out opportunity to those customers on the occasion of the transaction and subsequent communications.

In the case provided for above, the recipient shall be granted access to the appropriate means that allow him or her to refuse at any time the messaging of advertising in the future, freely and without cause.

Operators that undertake the messaging of unsolicited advertising have a double mandatory task: to maintain and update their personal opt-out lists, and to periodically (at least every quarter) consult the Public Opt-out List, which is maintained and updated by the Portuguese Authority for Consumer Rights (DGC) with the names and contact details of those who have expressed their wish not to receive such advertising communications.

Competition and merger control**50 Competition and telecoms and broadcasting regulation**

What is the scope of the general competition authority and the sectoral regulators in the telecoms, broadcasting and new media sectors? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation? Are there special rules for this sector and how do competition regulators handle the interaction of old and new media?

The main role of the media and telecoms regulators is the promotion of effective competition among operators. Both have regulatory powers to ensure that there is no distortion or restriction of competition in the respective sectors.

Both sectoral regulators and the Competition Authority have the obligation to cooperate with each other in matters related to the application of the legal regime of competition and shall

reciprocally inform each other of any practices restricting competition that they become aware of. Specifically, the transfer of rights of use for frequencies and the measures of Anacom in respect of the analysis of the market and the determination of whether or not an undertaking holds significant market power are subject to the prior opinion of the Competition Authority; and decisions and interim measures of the Competition Authority regarding prohibited practices are subject to the prior opinion of the sectoral regulators.

51 Competition law in the telecoms and broadcasting sectors

Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator controls these practices?

Undertakings in the telecoms and broadcasting sectors are subject to the general regime as regards prohibited practices. The competition authority is the competent regulator but its decisions (including interim measures) are subject to the non-binding prior opinion of the sectoral regulators.

52 Jurisdictional thresholds for review

What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting and new media sectors?

The thresholds for review concentrations are the creation or reinforcement of a 30 per cent share of the national market or a turnover of the undertakings exceeding €150 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €2 million.

Clearance shall be granted to concentrations that neither create nor strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it. In this respect it is important to note that Anacom has an important statutory role in telecoms market analysis and that the prior opinion of ERC is binding for radio broadcasting concentrations whenever grounded on a risk to free expression and an exchange of different views. Please see also questions 34 and 35.

53 Merger control authorities

Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms, broadcasting and new media sectors?

The Competition Authority is the competent regulator to issue the final decision. Sectoral regulators are heard by the Competition Authority and issue their prior opinions as previously mentioned.



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54 Procedure and timescale

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

The notification of a concentration shall be presented using an approved notification form and subject to the payment of certain fees. Notification only has effect from the date on which the fee is paid. If the Competition Authority decides to carry out an in-depth investigation, an additional fee is deemed to be payable.

As previously mentioned, the sectoral regulators are heard and in some cases their opinion is binding.

The Authority must deliver its decision on a notified concentration within 30 working days of the date on which the notification has effect. In case of an in-depth investigation, the time limit for the final decision shall be a further 90 working days from the date of the decision to start such investigation. These time limits are suspended whenever additional information is requested to the undertakings.



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