# Telecoms & Media 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the 22nd edition of *Telecoms & Media*, which is available in print and online at www.lexology.com/gtdt.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Alexander Brown and David Trapp of Simmons & Simmons LLP, for their continued assistance with this volume.

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Getting The Deal Through

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# Portugal

**Nuno Peres Alves and Mara Rupia Lopes**

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## COMMUNICATIONS POLICY

### Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The fundamental law for the electronic communications sector is the Electronic Communications Law, approved by Law No. 5/2004 of 10 February, as amended. This law transposes into national legislation Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC, all of the European Parliament and of the Council of 7 March, and Directive 2002/77/EC of the Council of 16 September.

The most relevant amendment was approved, with the republication of the entire body of the law, by Law No. 51/2011 of 13 September, to transpose the 2009 EU Regulatory Framework for Electronic Communications (the 2009 EU Regulatory Framework). The current version of Law No. 5/2004, as republished by Law No. 51/2011, results from the following amendments: Law No. 10/2013 of 28 January; Law No. 42/2013 of 3 July; Decree-Law No. 35/2014 of 7 March; Law No. 82-B/2014 of 31 December; Law No. 127/2015 of 3 September; Law No. 15/2016 of 17 June; Decree-Law No. 92/2017 of 31 July, which implemented Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks; and Decree-Law No. 49/2020 of 4 August, which establishes the sanctioning regime applicable to the violation of rules on open Internet access and regulated intra-European calls following Regulation (EU) No. 2015/2120 of the European Parliament and of the Council of 25 November 2015.

However, the Electronic Communications Law is not the only key law in this sector. Several aspects are regulated in separate legal instruments:

- Decree-Law No. 123/2009 of 21 May, as amended by Decree-Law No. 258/2009 of 25 September; Law No. 47/2013 of 10 July; Law No. 82-B/2014 of 31 December; Decree-Law No. 92/2017 of 31 July and Decree-Law No. 95/2019 of 18 July, governs the construction of infrastructure suitable for the accommodation of electronic communications networks, the deployment of electronic communications networks and the construction of infrastructure for telecommunications in housing developments, urban settlements and concentrations of buildings;
- the regime applicable to radio communications networks and stations is established in Decree-Law No. 151-A/2000 of 20 July, as amended;
- the regime for essential public services and the means of user protection is regulated under Law No. 23/96 of 26 July, as amended;
- the regimes governing the placing on the market, setting into service and use of radio equipment were approved by Decree-Law No. 57/2017 of 9 June; and
- Law No. 99/2009 of 4 November, as amended by Law No. 46/2011 of 24 April, determines the legal framework applicable to administrative offences committed within the communications sector, including infringement of legal and regulatory provisions.

The Electronic Communications Law further assigned the National Communications Authority (ANACOM) as the national regulatory authority.

Nowadays, there are no restrictions on foreign ownership or investment in the electronic communications sector in Portugal, except for the limits to cross-ownership (which are not exclusive to foreign investors) that apply to television and radio activities.

### Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The provision of electronic communications networks and services, whether publicly available or not, is only subject to a general authorisation. This regime determines that the execution of activities in the electronic communications sector does not depend on any prior decision or authorisation by ANACOM but is subject to a mere declaration of commencement of activity signed by the provider, after which the network or service provider may commence its activities.

Nevertheless, the use of spectrum frequencies and number allocation depends on the award of individual rights of use, which shall be conducted by ANACOM.

The award of spectrum frequencies depends on the type of frequency and can be performed through procedures of direct acquisition, public tender and auction. All frequencies and their respective types are listed in the National Frequency Allocation Board (QNAF).

The right to use the frequency is granted for a 15-year period, renewable for an equal period. The rights of use of frequencies should be awarded within 30 days or, when a competitive or comparative procedure is required (tender or auction), within the deadline set for that procedure, not exceeding eight months. The payable fees depend on the form of the award.

Regarding mobile networks, 2G (GSM) and 3G (UMTS) were granted through a tender offer and 4G (LTE) was granted by auction in 2011. Currently, the public auction for the attribution of 5G type licences is undergoing.

Under the QNAF, public Wi-Fi services are exempt from licensing.

The individual right of use of numbers is granted on a direct basis and shall be awarded within 15 days. The payable fees are determined by ANACOM. The allocation to operators is executed upon request or public tender or auction (applicable only if the relevant number is of exceptional economic value) and shall take up to 30 days.

Regarding the applicable fees for the authorisation and licensing process, Administrative Rule No. 1473-B/2008 of 17 December, as amended, approves the value of each payable fee. Fees are due in respect of:

- the issuance by ANACOM of statements supporting rights (issued after the receipt of the declaration of commencement of activity);
- the exercise of the activity by a supplier of electronic communications networks and services (the regulatory fee);
- the allocation of rights of use of frequencies and numbers; and
- the use of frequencies and numbers.

**Flexibility in spectrum use**

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Over the past 10 years, ANACOM has adopted a more flexible approach regarding the spectrum use, under the technological neutrality principle underlined in the 2009 EU Regulatory Framework, without neglecting acquired rights.

The spectrum licences generally specify the permitted use. All three licence types already granted – 2G, 3G and 4G – specify the permitted use along with the allocated frequencies. Currently, the public auction for the attribution of 5G type licences is undergoing.

The licensed spectrum is both tradable and assignable. It is, therefore, possible to trade or assign a licensed spectrum between companies, according to the rights granted in the licence, as long as ANACOM has not prohibited such transfer in respect of specific rights.

In the case of transfer, the holders of rights of use shall give ANACOM prior notification of their intention to transfer such rights, as well as the conditions under which they intend to conduct the relevant transfer. ANACOM is, within 45 working days, entitled to prohibit the transfer or assignment if the following conditions are not met:

- the transfer or lease does not distort competition, namely owing to the accumulation of rights of use;
- frequencies are efficiently and effectively used;
- the intended frequency use complies with what has been harmonised through the application of Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March (the Radio Spectrum Decision) or other EU measures; or
- the restrictions outlined in the law in respect of radio and television broadcasting are safeguarded.

**Ex-ante regulatory obligations**

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The communications markets subject to ex-ante regulation are those mentioned in the European Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets, and also in the European Commission Recommendation 2014/710/EU of 9 October 2014 (replacing the 2007 Recommendation).

The remedies ANACOM may impose are the following:

- transparency concerning the publication of information;
- non-discrimination concerning the provision of access and interconnection and the respective provision of information;
- accounting separation in respect of specific activities related to access and interconnection;
- price control; and
- cost accounting.

ANACOM shall impose the appropriate and justified obligations according to the nature of the identified problem.

The table opposite lists the applicable ex-ante regulatory obligations for each of the currently regulated markets. (References to the PT Group refer to the Portuguese historical operator, Portugal Telecom, currently named MEO.)

**Structural or functional separation**

5 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?

Yes. Under the 2009 EU Regulatory Framework, the Electronic Communications Law foresees functional separation as an exceptional remedy, if the imposition of all general ex-ante obligations has proven to be insufficient to ensure effective competition. ANACOM shall notify the European Commission, with proper justification, to impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity. On the other hand, the same undertakings may decide voluntarily to promote functional separation: the split of the wholesale unit shall be subject to prior notification to ANACOM so it can assess the effect of the intended transaction on existing regulatory obligations, through a coordinated analysis of the different markets related to the access network.

The Electronic Communications Law also determines, under the EU Regulatory Framework of 2002 and Directive No. 1999/64/EC of the Commission of 23 June 1999, that undertakings providing public electronic communications networks shall operate their cable television network through legally independent bodies if:

- they are controlled by an EU member state or enjoy special rights;
- they have a dominant position in a substantial part of the market in respect of the provision of public electronic communications networks and publicly available telephone services; or
- they operate a cable television network created through the enjoyment of special or exclusive rights in the same geographic area.

**Universal service obligations and financing**

6 Outline any universal service obligations. How is provision of these services financed?

The universal service obligations in Portugal include the following services:

- connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location (including dial-up access to the internet);
- provision of a comprehensive directory and telephone directory enquiry service; and
- adequate provision of public pay telephones.

In April 2019, ANACOM approved a Recommendation to the Portuguese Government regarding the designation process for new universal service providers, considering the expiry of the previous contracts (which occurred on 1 June 2019, in what concerns the connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location) and its proposal for a legislative amendment to the rules on universal service provision. According to ANACOM's Recommendation, universal service providers are to be designated on a national basis (covering all Portuguese territory) for each of the services comprised in the universal service obligations, but these should cease to include provision of a comprehensive directory and telephone directory enquiry services. Also, ANACOM has recommended that the following round of contracts should have a limited duration of one year, with a possible extension for one additional year, and that the reference amounts for the price of each of the specific services should be significantly reduced.

Related to the connection service, there is an additional obligation to provide a special price package for pensioners and retired users.

There are no universal service obligations associated with the provision of broadband.

| Markets | Operators concerned | Key remedies |
|---|---|---|
| Wholesale call termination on individual public telephone networks provided at a fixed location (Market 1 under the 2014 Recommendation) | MEO and all operators providing call termination on individual public telephone networks at a fixed location | To meet reasonable requests for access; to enable network access in fair and reasonable conditions; 10 days to justify the denial of access; (applies to MEO only) present a proposal for IP interconnection architecture;<br>non-discriminate in quality of service, delivery time and tariff;<br>transparency in the publication of information, including reference proposals; publish information about network configuration, interconnection points and prices; six months' pre-warning regarding interconnection changes; two months' pre-warning regarding other changes with impact to operators; (applies to MEO only) publish an interconnection reference offer; (applies to MEO only) publish prices, terms and conditions, technical information and information on quality of service; and<br>price control obligation; to set cost-oriented prices; set the same maximum termination price at local and single transit interconnection. |
| Wholesale for voice call termination on individual mobile networks (Market 2 under the 2014 Recommendation) | MEO<br>Vodafone<br>NOS | To meet reasonable requests for access;<br>non-discrimination in the access and interconnection offer and in the respective information provision;<br>transparency in the publication of information; and<br>price control. |
| Wholesale local access provided at a fixed location (Market 3a under the 2014 Recommendation) | MEO | To meet reasonable requests for access to network and use of specific network resources;<br>non-discrimination;<br>transparency;<br>accounting separation;<br>price control; and<br>availability of accounting records. |
| Wholesale central access provided at a fixed location for mass-market products (Market 3b under the 2014 Recommendation) | MEO | Applicable only to non-competitive areas:<br>to meet reasonable requests for access to network and use of specific network resources;<br>non-discrimination;<br>transparency;<br>accounting separation;<br>price control; and<br>availability of accounting records. |
| Wholesale high-quality access provided at a fixed location (Market 4 under the 2014 Recommendation) | MEO | To meet reasonable requests for access; (applies to MEO only) must include in the new reference offer any viable proposal from the operators; ensure capacity expansion in CAM (Mainland, Azores and Madeira) and inter-island circuits, including capacity up to 10Gbps; to negotiate in good faith with undertakings requesting access and not to withdraw access to facilities already granted; provide for the possibility of co-installation in MEO's sites; ensure the interconnection between co-installed operators in the MEO sites;<br>provide alternative operators with the information, resources and services on time, on a basis and with a quality not inferior to that offered to MEO's retail and corporate departments; practice at wholesale level deadlines for delivery and repair of contractual damages shorter than equivalent deadlines in retail markets; not to make fidelity, quantity or capacity discounts without grounds; ensure specific quality of service objectives for CAM and inter-islands circuits; not to convey to the retail department or to the Group's own companies information about the leased lines service to other operators; and publish performance levels as set in the determination of 11 March 2009;<br>publish and maintain on the website the (new) Ethernet and digital leased lines reference offer; clearly identify the changes made to the offer at each change; 30-day pre-warning regarding changes to the offer; 60-day pre-warning regarding structural changes in the support network or relevant technologies or services in the offer; change the offer within 90 calendar days after notification of the final decision on this market analysis;<br>costing system and accounting separation;<br>to set prices on the basis of cost orientation; reduce by at least 66 per cent the price of traditional CAM circuits up to 2Mbps; provide annual data on the total costs and capacity contracted by operators and that used and reserved by MEO itself; and<br>availability of accounting records (Customs Accounting System), including data regarding revenue from third parties. |
| Wholesale for call origination on the public telephone network provided at a fixed location (Market 2 under the 2007 Recommendation) | Companies of the PT Group that operate in this market | To meet reasonable requests for access;<br>non-discrimination in the offer of access and interconnection and respective provision of information;<br>transparency in the publication of information, including reference proposals;<br>price control obligation and cost accounting; and<br>accounting separation and cost accounting system regarding specific activities related to access or interconnection (applies to PT Group only). |

The Electronic Communications Law determines that if ANACOM verifies that the universal service has net costs and finds such costs to be an excessive burden, it is incumbent upon the government, following the request of the respective provider, to arrange for appropriate compensation taken either from public funds or by sharing the net cost with other undertakings providing publicly available electronic communications networks and services on national territory.

Law No. 35/2012 of 23 August (amended and republished by Law No. 149/2015 of 10 September) establishes that the net costs of universal service are financed by the Fund for the Universal Service, and determines that the financing of the universal service's net costs shall be based on its sharing among undertakings providing public communications networks or publicly available electronic communications services on national territory that, in the calendar year to which the net costs relate, registered an eligible turnover in the electronic communications sector, which gives them a weight equal to or higher than 1 per cent of the sector's overall eligible turnover. The Fund shall be deemed to constitute autonomous property, without legal personality, and is managed and legally represented by ANACOM.

**Number allocation and portability**

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The Electronic Communications Law states that the rights to use numbers are awarded to companies that offer or use electronic telecommunication networks or services. Those rights are allocated by open, objective, transparent, non-discriminatory and proportionate procedures. As a rule, the rights to use numbers are awarded by ANACOM within 15 days after the submission of the request by the operators. In the case of rights of use for numbers of exceptional economic value, ANACOM can grant them through competitive or comparative selection procedures, including by tender or auction.

Since November 2019, ANACOM defines the conditions that enable electronic communications service providers, with a small number of customers or those that operate on a relatively small national scale, to use, by agreement, the numbers allocated to other providers in the offer of the same service. This measure will boost competition in the offer of electronic communications services, eliminating barriers to the entry of companies in the market, while also optimising the use of numbering resources and increasing consumer freedom of choice.

All providers of publicly available telephony services (ie, both fixed and mobile) must offer number portability and are obliged to cooperate to enable such portability and ensure minimum quality standards. With the new rules implemented by the revised 2009 EU Regulatory Framework, the right to portability was reinforced by reducing the porting deadline to one working day.

Number portability is managed by an independent entity (the Reference Entity).

The Electronic Communications Law determines that number portability must be required by the subscriber of the new service provider, accompanied by the note of termination of the former subscription agreement. The new service provider engages the former provider by electronic request, indicating three portability windows in which the portability can be executed. The former provider can deny portability only in very restricted cases, acceptance of the request being the general rule.

There is a special concern in the regime in preventing any unwanted portability, which is why both service providers involved have a particular responsibility to ensure that the person requesting portability is the legal subscriber of the contract associated with the relevant number.

Portability is also governed by ANACOM Regulation No. 58/2005 of 18 August, amended and republished by Regulation No. 114/2012 of 13 March, and, more recently, by Regulation No. 257/2018 of 8 May, and by Regulation No. 85/2019 of 21 January.

**Customer terms and conditions**

8 Are customer terms and conditions in the communications sector subject to specific rules?

Yes. The Electronic Communications Law establishes several mandatory rules applicable to the contracts concluded with consumers and end users.

The contract must specify, among other conditions, the following:

- services provided;
- the minimum service quality levels offered;
- information as to whether or not access to emergency services is provided;
- details of prices;
- payment methods offered and any charges or penalties due because of the choice of each payment method;
- the duration of the contract and the conditions whereby the contract or services may be renewed, suspended or terminated;
- explicit indication of the subscriber's willingness in respect of the inclusion or not of their respective personal information in a public directory; and
- the type of action that might be taken by the provider in reaction to network security or integrity incidents.

Regarding contract duration, the Electronic Communications Law, as amended, determines that companies that provide electronic communication services must offer contracts without a binding period, as well as contracts with six- and 12-month binding periods. The binding period in contracts for the provision of electronic communications services concluded with consumers may not exceed 24 months, unless in specific cases such as customer consent and equipment upgrade.

In parallel with the telecom regulation, customer terms and conditions are also subject to the regime on standard contractual clauses, approved by Decree-Law No. 446/85 of 25 October, and general consumer protection regulations.

Providers are obliged to communicate their standard contracts to ANACOM, which is entitled to determine that operators cease or adapt immediately to the use of standard contracts where it verifies the failure to comply with legal rules.

**Net neutrality**

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Regulation (EU) No. 2015/2120 of the European Parliament and of the Council of 25 November 2015, as amended, establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights. This regulation imposes the obligation on internet services providers to treat all traffic equally, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used. Afterwards, the Body of European Regulators for Electronic Communications sought to clarify the rules of Regulation (EU) No. 2015/2120, by publishing in August 2016 some guidelines on the implementation by national regulators, including ANACOM, of European Net Neutrality Rules.

Under this regulation and guidelines, zero-rating is not prohibited. However, a zero-rating offer where all applications are blocked once the

data cap is reached except for zero-rated applications would infringe the regulation. Also, bandwidth throttling is permitted only as an extraordinary measure imposed by law, by a court decision or by a public authority. It is also permitted in other cases, such as, to preserve the integrity and security of the network and to prevent impending network congestion.

**Platform regulation**

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no specific Portuguese legislation or regulation relating to the generality of digital platforms, besides the law applicable to information society services and e-commerce – Decree-Law No. 7/2004 of 7 January, as amended. Notwithstanding, digital platforms relating to gambling and crowdfunding are regulated by the legislation applicable to the activities provided through these platforms.

Digital platforms used for transportation activities are regulated by Law No. 45/2018 of 10 August.

**Next-Generation-Access (NGA) networks**

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are no specific regulatory obligations.

However, in the context of the deployment of NGA networks, the regime governing the construction of infrastructure suitable for the accommodation of electronic communications networks and the access to such infrastructure by telecommunications operators has been approved by Decree-Law No. 123/2009 of 21 May, as amended by Decree-Law No. 258/2009 of 25 September, Law No. 47/2013 of 10 July, Law No. 82-B/2014 of 31 December, Decree-Law No. 92/2017 of 31 July and Decree-Law No. 95/2019 of 18 July.

There is no government financial scheme to promote basic broadband. However, in 2008, following a public tender, four contracts were executed between the Portuguese state and two private companies, regarding NGA broadband penetration in rural areas. In all cases, the public investment is less than 50 per cent of the total amount necessary, and such public investment was funded with EU funds. The contracts were executed after the corresponding European Commission decision regarding state-aid rules.

**Data protection**

12 Is there a specific data protection regime applicable to the communications sector?

Yes. In the electronic communications sector, the processing of personal data is regulated by Law No. 41/2004 of 18 August (which transposes into national legislation Directive 2002/58/EC of the European Parliament and of the Council of 12 July, concerning the processing of personal data and the protection of privacy in the electronic communications sector). This law was amended by Law No. 46/2012 of 29 August (which transposes the part of Directive 2009/136/EC amending Directive 2002/58/EC of the European Parliament and of the Council of 12 July). This regime aimed to specify and complement the provisions of Law No. 67/98 of 26 October, which has now been revoked by Law No. 58/2019 of 8 August, which transposed the Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons concerning the processing of personal data and the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation), into the Portuguese legislation.

Law No. 41/2004 determines that undertakings providing electronic communications networks or services shall ensure the inviolability of communications and the related traffic data through a public communications network and publicly available electronic communications services. Listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by anyone other than users is prohibited without the prior and explicit consent of the users concerned, except for cases provided in the law.

To this effect, providers of publicly available electronic communications services shall take appropriate technical and organisational measures to ensure the security of their services, in cooperation with the provider of the public communications network.

There is an obligation of the providers of publicly available electronic communications services to notify the National Data Protection Commission (CNPD) of any personal data breach. Where the personal data breach is likely to adversely affect the personal data of the subscriber or user, providers of publicly available electronic communications services shall also notify the latter of the breach.

In the scope of this law, the CNPD and ANACOM are entitled to:

- draw up regulations on practices to be adopted to comply with this law;
- give orders and make recommendations;
- publish on the respective websites any codes of conduct they are aware of; and
- publish on the respective websites any other information deemed to be relevant.

**Cybersecurity**

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Article 54-A to 54-G of the Electronic Communications Law enshrines obligations applicable to operators providing public communications networks or publicly available electronic communications services, including taking appropriate technical and organisational measures to appropriately prevent, manage and reduce the risks posed to the security of networks and services, aiming, in particular, to prevent or minimise the impact of security incidents on interconnected networks, at the national and international level, and users, and to notify ANACOM of a breach of security or loss of integrity with a significant impact on the operation of networks or services. ANACOM is entitled to approve and impose technical implementing measures on operators that provide public communications networks or publicly available electronic communications services.

It is incumbent on ANACOM to:

- inform the national regulatory authorities of other member states and the European Network and Information Security Agency (ENISA) where this is deemed to be justified on account of the scale or seriousness of the breach of security or loss of integrity notified by the operators;
- inform the public, by the most appropriate means, of any breach of security or loss of integrity or to require operators to do so, where it determines that disclosure of the breach is in the public interest; and
- submit an annual summary report to the European Commission and ENISA on the notifications received on breach of security or loss of integrity, by the operators, and the action taken thereon.

In March 2019, ANACOM enacted a specific regulation governing in greater detail technical and implementation aspects of the above legal provisions regarding the security and integrity of electronic communications networks and services.

Additionally, Law No. 109/2009 of 15 September (which transposes into national legislation the Framework Decision No. 2005/222/JHA of the Council of the European Union of 24 February 2005), establishes substantive and procedural criminal provisions, as well as provisions on international cooperation in criminal matters related to the field of cybercrime. Finally, Law No. 46/2018 of 13 August, which establishes the legal framework for security in cyberspace and transposes Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016, concerning measures for a high common level of security of network and information systems across the European Union (NIS Directive), is also applicable.

**Big data**

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no specific legislation or regulation relating to or addressing the issues arising from big data.

**Data localisation**

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no laws or regulations that require data to be stored locally.

**Key trends and expected changes**

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

In the context of the emergency responses pursuant to the covid-19 pandemic, the Portuguese government approved specific legislation (Decree-Law No. 10-D/2020 of 9 April) that allowed electronic communications operators to adopt exceptional traffic management measures to prevent or mitigate congestion in their networks and imposed some obligations related to the provision of basic services and critical clients (health system and security forces, etc). This exceptional framework was repealed in August 2020. However, due to the second lockdown in Portugal, some of its obligations were reinstated in January 2021 by Decree-Law No 14-A/2021 of 12 January, with obligations such as identifying critical electronic communications services and defining categories of priority customers. Other exceptional and temporary measures were adopted in response to the coronavirus, namely those provided for in Law No. 7/2020 of 10 April, which approved a set of rules aimed at prohibiting the suspension and supply of electronic communication services during the initial state of emergency and the following month in cases where consumers were in financial difficulty due to the pandemic. This prohibition is still in force, at least during the first part of 2021.

Meanwhile, the Body of European Regulators for Electronic Communications (BEREC) approved the 'Joint Statement from the Commission and the Body of European Regulators for Electronic Communications (BEREC) on coping with the increased demand for network connectivity due to the Covid-19 pandemic', which discussed the imminent need to adopt exceptional traffic management measures in the light of the rules on Open Internet Access.

The public auction to award the spectrum for the deployment of 5G is already being carried out by the government and ANACOM is expected to be completed within the first quarter of 2021.

More recently, within the scope of new a digital legislative package, the government is working with operators and regulators to create a social tariff for internet services. The objective is to create a social tariff for access to broadband internet services that allows its most widespread use, to promote inclusion and digital literacy in the most disadvantaged sections of the population, according to the resolution of the Council of Ministers 30/2020, which approved the Digital Transition Action Plan.

The government and ANACOM are preparing the draft of a new electronic communications law, to transpose into national legislation Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code. Under the Directive, the new law should be in force by 21 December 2020.

## MEDIA

**Regulatory and institutional structure**

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

The media sector in Portugal is regulated by the Regulatory Authority for Media (ERC), a public entity created by Law No. 53/2005 of 8 November.

There are three key legal frameworks, one for each of the different areas:

- Television Law No. 27/2007 of 30 July, as amended by Law No. 8/2011 of 11 April; Law No. 40/2014 of 9 July Law No. 78/2015 of 29 July; Law No. 7/2020 of 10 April; and Law No. 74/2020 of 19 November;
- Radio Law No. 54/2010 of 24 December, as amended by Law No. 38/2014 of 9 July and Law No. 78/2015 of 29 July; and
- Press Law No. 2/99 of 13 January, as amended by Law No. 18/2003 of 3 February; Law No. 19/2012 of 8 May; and Law No. 78/2015 of 29 July.

On the subject of changes, Law No. 78/2015 of 29 July introduced several amendments regarding the promotion of transparency in the ownership, management and financial resources of undertakings pursuing social communication activities, addressing the concerns of information and conflict of interests in these areas and amending the Press Law, the Television Law and the Radio Law.

Law No. 33/2016 of 24 August supports the expansion of the provision of digital terrestrial television programme services, ensuring proper technical conditions and price control.

**Ownership restrictions**

18 | Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Regarding television and radio, although no foreign ownership restrictions apply, there are some restrictions on investment.

In television, no company can directly or indirectly own more than 50 per cent of the licences issued for free-to-air television. Political parties or associations, local authorities or their associations, trade unions, or employers or professional associations are not allowed to perform or finance, either directly or indirectly, television activity.

In radio broadcasting, ownership is restricted to 10 per cent of the local radio licences issued in Portuguese territory, or several radio licences equal to 50 per cent or more of the radio stations with the same territorial coverage and using the same frequency band. Therefore, companies cannot directly or indirectly hold more than the above-mentioned percentages.

The Press Law does not specifically regulate ownership or control, so general competition law rules apply.

The ownership or control of media companies, including radio, television and newspapers, can also be restricted within the context of concentrations between undertakings: general rules of competition law apply, and the decision of the Competition Authority is subject to a prior opinion of the ERC, which shall be mandatory if the ERC considers that the concentration harms media plurality.

**Licensing requirements**

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

Under both the Television and Radio Law, television and radio broadcasting shall only be performed by companies that pursue such activities as their main corporate object.

The right to broadcast television and radio is subject to the award of a licence by the ERC through a public tender launched by a decision of the government. It is incumbent upon the ERC to grant, renew, alter or repeal licences or authorisations to pursue media broadcasting activity. The fees and timescale associated with such activity depend on the terms provided in the public tender.

The spectrum allocation for the performance of television and radio broadcasting is one of the National Communications Authority's (ANACOM) statutory goals, which ANACOM must execute having considered the ERC's opinion. The use of the spectrum intended for broadcasting unrestricted free-to-air television programme services and radio is made under the National Frequency Allocation Board.

The conditioned access television programme services that require a subscription (pay TV) do not use a spectrum and therefore such broadcasting is only subject to obtaining a licence granted by the ERC.

Concessions for public media broadcasting services, both radio and television, shall be granted for a 15-year period, subsequently renewable for equal periods, under the terms of the concession contract to be executed between the state and the concessionaire.

In general, fees payable to the ERC in respect of the exercise of the media activity were approved by Decree-Law No. 103/2006 of 7 June, amended by Decree-Law No. 70/2009 of 31 March, rectified by the Statement of Rectification No. 36/2009 of 28 May and amended by Decree-Law No. 33/2018 of 15 May. The amounts of the fees due concerning the issuance of a licence by the ERC are defined in Administrative Rule No. 136/2007 of 29 January, as amended by Decree-Law No. 70/2009 of 31 March and Administrative Rule No. 785/2009 of 27 July.

**Foreign programmes and local content requirements**

20 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 fall outside this regime?

The Television Law mandates that operators who provide television programme services with national coverage shall reserve a majority proportion of their transmission time for European works, excluding the time appointed to news services, sports events, games, advertising, teleshopping and teletext services.

Concerning local requirements, the Radio Law also determines that the music programming of radio programme services must include Portuguese music with a minimum quota ranging from 25 to 40 per cent. Aside from these specific obligations, there is also a general rule for the media sector to extend television programming to regional or local contents, broadcast information with a specific interest for the audience's geographic scope and promote typical values of regional or local cultures.

**Advertising**

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

Broadcast media advertising is regulated by the Advertising Code (approved by Decree-Law No. 333/90 of 23 October, as amended), more specifically, by the Television and Radio Law, regarding advertising in television and radio, respectively.

The Advertising Code regulates sensitive areas such as advertising of alcoholic beverages and tobacco, and false advertising. The Code states that advertising must respect human dignity and must not promote discrimination or any harmful behaviour.

Concerning television, the amount of spot advertisement and teleshopping in every two-hour period shall not exceed 10 per cent or 20 per cent of the airtime, depending on the type of programme service: pay TV services or free-to-air television programme services, unrestricted or subject to a subscription. This limit excludes announcements made by television operators in connection with their own programmes and ancillary products directly linked to those programmes, and also public service or public interest announcements and humanitarian appeals broadcast free of charge, as well as the identification of sponsorships. Windows devoted to teleshopping shall be of a minimum uninterrupted duration of 15 minutes. Currently, a proposal exists for a Directive (amending Directive No. 2010/13/EU of 10 March), which stipulates that the daily proportion of television advertising spots and teleshopping spots within the period between 7am and 11pm shall not exceed 20 per cent. Advertising is also prohibited for foodstuffs and drinks with a high energy value, salt content, sugar, saturated fatty acids and processed fatty acids in television programme services and audiovisual communication services on request and on the radio in the 30 minutes before and after children's programmes, and television programmes that have a minimum of 25 per cent audience below 16 years old, as well as the insertion of advertising in the respective interruptions.

The Radio Law also predicts similar restrictions. The inclusion of advertising in the broadcast programmes must not affect the integrity of the programmes and shall take into account programmes' breaks, their duration and nature. The broadcasting of advertising material shall not exceed 20 per cent of the total licensed programme services airtime and sponsored programme slots must make explicit reference to the sponsorship at the beginning of the programme.

The Press Law does not specifically regulate advertising in the sector, so general rules apply.

**Must-carry obligations**

22 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?

ANACOM shall impose must-carry obligations upon undertakings providing electronic communications networks used for the distribution of radio or television broadcasts where such networks are used by a significant number of end users as the principal means of receiving radio and television broadcasts. Those obligations shall be to transmit radio and television broadcast channels and services as specified by ANACOM, under the law. Must-carry obligations shall be imposed only where they are necessary to meet clearly set purposes of general interest and shall be reasonable, proportionate, transparent and subject to periodical review.

Under the Television Law, the provider of the digital terrestrial broadcasting network is obliged to reserve transmission capacity for television programme services broadcast by terrestrial means in the analogue mode provided by operators holding licences or concessions

in force at the date of entry into force of said law (which are the three free-to-air Portuguese TV operators with national coverage). Under Law No. 33/2016 of 24 August, the same provider is also obliged to reserve capacity for two thematic programme services produced by the public service provider.

**Regulation of new media content**

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

In general, new media content and its delivery are not regulated differently from traditional broadcast media, with few exceptions.

The Television Law excludes from its subject the concept of television communication services operating individual demand.

Content provided through non-linear broadcasting services (eg, video-on-demand from the linear broadcasting service) would normally be regulated in the same manner as other broadcasting services, but is, in fact, subject to a lighter regulatory regime. This regime includes basic rules on the protection of minors, the prevention of racial hatred and the prohibition of certain types of publicity.

**Digital switchover**

24 | 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?

The provision of the digital broadcasting service was awarded to MEO by tender offer in 2008. The switchover from analogue to digital was concluded in 2012, as scheduled, with all remaining transmitters and relays still broadcasting analogue signals being switched off on 26 April that year. As of 12.30pm on that day, all digital television signals being broadcast in Portugal became digital.

The radio frequencies freed up by the switchover were primarily allocated to the 4G (LTE) mobile network.

**Digital formats**

25 | Does regulation restrict how broadcasters can use their spectrum?

ANACOM and the ERC are in charge of the regulation of the spectrum used in media services and they authorise the use of the frequencies and supervise broadcasters' fulfilment of their obligations. These obligations can include almost every aspect of the spectrum use, from technical requirements to general obligations related to the broadcasting activities.

ANACOM also has powers to modify, revise and even impose new conditions grounded on public interest reasons. Currently, there are no specific regulations restricting spectrum use concerning multi-channelling, high-definition and data services, other than the restrictions established in the licences or arising from legal must-carry obligations.

**Media plurality**

26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There is no specific process for ex-ante assessment or regulation regarding media plurality, besides the intervention of the ERC in the context of concentrations between undertakings.

Both ANACOM and the ERC may contribute, within the scope of their remit, to ensure the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as pluralism. Specifically, in the television, radio and press sectors, the ERC is incumbent to guarantee information that observes pluralism, accurateness and independence, and to ensure diverse and plural programming, including during peak viewing periods. These powers are used within the supervision of the sector, including in the scope of administrative infringements and the licensing administrative procedures.

**Key trends and expected changes**

27 | Provide a summary of key emerging trends and hot topics in media regulation in your country.

Following Decision (EU) No. 2017/899 of the European Parliament and of the Council on the use of the 470-790MHz frequency band in the European Union, on 27 June 2018, ANACOM approved the 'National roadmap for the 700 MHz band', containing the harmonised technical conditions and a common deadline for effective use of the 700MHz band and long-term use of the sub-700MHz frequency band for audio-visual distribution pursuant to the development of the fifth mobile generation. The roadmap was approved by the government, through an order issued by the Secretary of State for Infrastructure and should be implemented soon.

On 9 September 2020, the ERC approved a regulation, Regulation No. 835/2020 of 9 of September on the transparency of the financial resources of media operators.

## REGULATORY AGENCIES AND COMPETITION LAW

**Regulatory agencies**

28 | Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The National Communications Authority (ANACOM) is the regulator in the electronic communications and postal sector and the media sector is regulated by the Regulatory Authority for Media (ERC). The antitrust regulator is a different body, the Portuguese Competition Authority (ADC), responsible for the implementation of the general framework for competition's protection.

The general framework for the protection of competition, approved by Law No. 19/2012 of 8 May, determines that when a market subject to sectoral regulation is concerned, the ADC shall request the prior opinion of the respective regulatory authority before applying any measure. The sectoral regulator shall then have a maximum period of five working days to issue its opinion.

In general, the relevant legislation for each sector defines mechanisms to avoid conflicting jurisdiction. Both ANACOM and the ERC organic statutes determine that ANACOM and the ERC shall cooperate and collaborate with the ADC while respecting the corresponding assignments in matters relating to the implementation of the legal framework for competition in the communications and media sectors.

For cooperation between sectoral regulators and the ADC in the application of competition law, the relevant entities have entered into bilateral cooperation agreements, such as the Protocol for Cooperation executed on 26 of September 2003 between ANACOM and the ADC and the Protocol signed on the 27 of June 2007 between ANACOM and the ERC.

To ensure the consistent enforcement of competition and sectoral regulation, the applicable legislation sets out that the violation of sectoral regulation as an administrative offence is subject to the application of fines, which can be up to €5 million under the Electronic Communications Law, €375,000 under the Television Law and €100,000 under the Radio Law.

Also, ANACOM and the ERC can suspend and even revoke licences in case of severe offences.

The administrative offences in the media sector are also weighted by the ERC in the process of licence renewal, which can cause an adverse effect resulting in the denial of the request for renewal.

**Appeal procedure**

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

The application of fines as a result of an administrative offence can be contested at the Court of Competition, Regulation and Supervision.

The other decisions issued by the regulators shall be contested before administrative courts. In the appeal proceedings, only grounds related to law and procedure may be used. The merits of the administrative decisions regarding the use of discretionary powers cannot be discussed before the courts, unless based on an infringement of general principles of law, such as equality, proportionality and impartiality, or an ostensive error of judgement.

**Competition law developments**

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The past few years have witnessed some interesting merger and antitrust decisions in the communications and media sectors in Portugal.

In 2019, the Portuguese Competition Authority also decided to close several ongoing investigations into the acquisition of sports broadcasting rights and a rights-sharing agreement between electronic communications (pay TV) operators given the lack of evidence that the practices in question might result in any restrictive effects on competition in the affected markets. Closure of these investigations follows a trying two-year period during which the operators in question were routinely required to provide very extensive information and documentation in response to several requests for information put forward by the competition authority.

A new and innovation-friendly regulatory paradigm seems to be emerging, having, for example, a recent Issues Paper from the Portuguese Competition Authority on Technological Innovation and Competition in the Financial Sector, which proposed the creation of regulatory sandboxes to encourage the development of fintech start-ups and new business models for the financial sector.

**Coronavirus**

31 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In the context of the covid-19 pandemic, the Portuguese government has enacted specific legislation enabling electronic communications operators to adopt exceptional traffic-management measures to prevent or mitigate network congestion during lockdown periods such as Decree-Law No. 10-D/2020 of 23 March, which aimed at responding to the sizeable increase in traffic volumes on fixed and mobile networks by adopting exceptional and temporary measures for the electronic communications sector, such as identifying critical electronic communications services and defining categories of priority customers.

Decree-Law No. 10-D/2020 also temporarily exempted electronic communications network and service providers from complying with several obligations, such as:

- certain quality of service parameters;
- the standard deadlines for responding to consumer complaints;
- defined periods within which to ensure specific mobile broadband coverage obligations; and
- an extension of remote portability request implementation deadlines to five business days.

This exceptional set of rules was repealed in August 2020. However, due to the second lockdown in Portugal, some of its obligations were reinstated in January 2021 by Decree-Law No. 14-A/2021 of 12 January, which included identifying critical electronic communications services and defining categories of priority customers.

Other exceptional and temporary measures were adopted in response to the coronavirus such as those provided for in Law No. 7/2020 of 10 April, which approved a set of rules aimed at prohibiting the suspension of supply of electronic communication services during the initial state of emergency, and in the following month, in cases where consumers were in financial difficulty due to the pandemic. To date, this prohibition is still in force.

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