

# Portugal

Filipa Arantes Pedroso and João Alfredo Afonso

Morais Leitão, J Galvão Teles & Associados

## POLICY

### Policy

- 1 How would you summarise government and regulatory policy for the telecoms sector? What is the policy-making and policy development procedure?

The telecoms industry in Portugal has traditionally been heavily regulated. Over the past few years and following the approval of Law 91/97 of 1 August 1997, (the Basic Law of Telecommunications), Portugal has privatised the public operator, Portugal Telecom SA (PT). As a member of the European Union, Portugal has, as of 1 January 2000, opened its telecoms market to full competition, including public switched fixed telephone services and related infrastructure.

The Portuguese telecoms regulator, the ICP-ANACOM – Autoridade Nacional de Comunicações (the ICP-ANACOM), advises the government on telecoms policy and legislation and monitors compliance with concessions, licences and permits granted to telecoms providers in Portugal. The ICP-ANACOM is accountable to the Ministry in charge of telecommunications (formerly the Ministry of Social Equipment (MSE) and now, in principle, the Secretary of Communications at the Ministry of Economy). The Ministry retains basic responsibility for telecoms policy in Portugal. Over the past few years the government has substantially increased the autonomy of the ICP-ANACOM and allowed it to become a more effective and independent regulatory body. More recently, on 6 January 2002, a new law (Decree Law 309/2001 of 7 December 2001) regulating the powers of ICP-ANACOM entered into force. This, among other things (such as changing the name of the Portuguese Telecoms regulating body from Instituto de Comunicações de Portugal to ICP – Autoridade Nacional de Comunicações), has expressly reinforced the regulator's powers including the powers to approve and publish legally binding regulations.

In the last few years, there has also been a significant increase of European Union pressure on the Portuguese state to fully promote the implementation of a totally liberalised telecoms market, notably in areas in which, although proper regulation has been approved, some practical issues have been raised by the dominant operators (eg unbundling of the local loop).

## Public/private ownership

- 2 What, if any, proportion of the stock of any incumbent operator is in the ownership of the public or of private enterprise?

The telecoms market has changed from a monopoly held by PT to a fully competitive market. The state incorporated PT in June 1994 through the merger of its wholly owned telecoms providers, Telecom Portugal, TLP and TDP in order to strengthen the competitiveness of the telecoms sector. PT has been wholly privatised since December 2000, but the government retains a golden share in PT which provides the government with the right to veto a number of important decisions, including, inter alia, the payment of dividends in excess of 40 per cent of distributable net income in any year, capital increases and other amendments to PT's articles of association. In addition, a government vote is required to elect a third of the directors, including the chairman of the board.

## REGULATION AND LICENSING

### WTO Basic Telecommunications Agreement

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

As with all other EU Member States, Portugal has committed to the WTO Basic Telecommunications Agreement. The exceptions introduced are no longer applicable.

### Fixed, mobile and satellite services

- 4 Comparatively, how are fixed, mobile and satellite services regulated?

Fixed, mobile and satellite services are generally regulated by the Basic Law of Telecommunications and its developing regulations. With respect to licensing requirements, Decree Law 381-A/97 of 30 December 1997 implements the EU Licensing Directive. Among other features, this Decree Law expressly requires a separate licence to provide public fixed telephone services.

Regarding the provision of mobile and satellite services, such Decree Law does not address them specifically. However, a licence will be required beforehand for the provision of such services if they involve either:

- the establishment and/or provision of public telecoms networks; or
- the establishment of networks or the provision of services requiring the granting of frequencies.

To the extent the provision of mobile and satellite services involves the use of frequencies, the application for a licence must be preceded by a public tender (which has occurred for mobile services and fixed wireless access systems). The rules of the tender are approved on a case-by-case basis by the MSE and published in the *Official Gazette*.

In cases where the mobile and satellite services provided are not subject to a prior licensing procedure (if they do not involve the activities mentioned above), simple registration with the ICP-ANACOM will be sufficient.

### Satellite facilities and submarine cables

**5** In addition to the requirements under question 4 above, are there any other rules applicable to the establishment and operation of satellite earth station facilities, and, where applicable, the landing of submarine cables?

Although there are no specific regulations on the establishment and operation of satellite earth station facilities, there are several rules regulating certain characteristics of electric and electronic devices that may be applicable to satellite earth station devices.

For instance:

- Resolution of the Ministers Council 16/94 of 22 March 1994, approves the instructions of telecommunications safety (SEGMAC3);
- Regulation (Portaria) 767-A/93 of 31 August 1993, establishes the technical characteristics required for certain electronic and electrical devices (those described in the EU Directive 89/336/CEE);
- Decree Law 74/92 of 29 April 1992, implements the EU Directive on electromagnetic compatibility;
- Decree Law 117/88 of 12 April 1988, sets forth the general health and safety regime with regard to electronic devices;
- There are also no specific regulations on the landing of submarine cables. In any case, assuming the landing of submarine cable relates to the establishment of a public telecoms network; establishment of such a network is subject to a prior licensing procedure requirement. The Decree Law 381-A/97 of 30 December 1997, expressly recognises the right of public telecoms networks' operators to install and maintain their infrastructures in the public domain (such as Portuguese territorial waters).

### Public telecoms services

**6** Under what conditions may public telecoms services be provided?

According to Decree Law 381-A/97 of 30 December 1997, the provision of telecoms services is generally subject to simple registration (which does not imply any type of authorisation) with the ICP-ANACOM. However, a specific licence is required to:

- provide public fixed telephone services;
- establish and/or provide public telecoms networks;
- establish networks or provide services which require the granting of frequencies; and
- conduct operations where the operator is subject to obligations concerning universal service provision, open network provisions or interconnection duties that derive from the holding of a significant market share (a market share of 25 per cent in the relevant telecoms market is presumed a substantial power in the relevant market).

To apply for a licence that is not subject to a public tender

process, the applicant must meet numerous requirements. Specifically the applicant must:

- be a commercial company legally incorporated and having as its object the activities of telecoms services and the establishment, management and operation of telecoms networks;
- possess the technical capacity to comply with the specific obligations of the licence the operator wants to obtain;
- have an adequate economical and financial structure (25 per cent of the amount of the global investment proposed is considered as adequate);
- have organised accounting procedures; and
- provide evidence that the company is not in debt to the state or social security.

The applicant must file the application with (i) evidence that the above-mentioned requirements are fulfilled; (ii) justification of the request; (iii) description of the activity it proposes to develop, including the technical project containing the technological system, plan of development of the system, plan of coverage, operation of the system and quality levels of the service to be offered.

If the applicant is a foreign company the above-mentioned documentation must be certified by the relevant authorities in the applicant's country.

### Foreign ownership

**7** Are there any foreign ownership restrictions applicable to authorisation to provide any telecoms services?

There are no restrictions on foreign persons or companies conducting telecoms activity in Portugal.

### Fees

**8** Which fees are payable for which types of authorisation?

The licensing and registration fees due to the ICP-ANACOM are the following:

For each act of registration	€199.52
For each amendment to a registration entry	€19.88
For replacement of the registration certificate should the original be lost	€19.88
For issuance of a licence within a tender procedure	€49,879.79
For issuance of a licence not within a tender procedure	€9,975.96
For each amendment to a licence	€49.40
For replacement of the registration certificate in case the certificate is lost	€498.80
For licence renewal	€1,496.39

The following additional annual fees are also charged:

€498.90	For provision of audiotext services
€7,481.97	For the provision of all other telecoms services not subject to licence (see question 5)
€9,975.96	For the provision of all telecoms services subject to licence (see question 5)
€9,975.96	For the exercise of the activity of operator of public telecoms networks

Separately, a fee of €99,759.58 has been approved for the attribution of four UMTS licences; the amount implies a fee of PTE 20,000 million. (Although the relevant laws establishing the amounts for the fees were not changed in order to reflect the change of currency from Portuguese Escudos to Euros, from 1 January 2002 all amounts must be expressed in the Euro currency.)

### Authorisation timescale

- 9** What is the time taken by the licensing authority for grant of licences or other necessary authorisations?

The decision to grant or refuse the licence has to be taken by the minister of MSE within eight months of the opening of the tender, if a tender is required, or, in other cases, by the ICP-ANACOM, 30 days after the filing of the request. The delay of 30 days may be exceptionally extended for periods of 30 days up to a maximum of 90 days, if the technical project is of great complexity. It is important to note that the delay is suspended every time any clarification is requested by the ICP-ANACOM.

### Licence duration

- 10** What is the normal duration of licences?

Licences are issued for a period of 15 years and may be renewed for equal periods of time at the licensee's request three years before the licence expires. The renewed licence must be issued by the ICP-ANACOM within one year of the request for renewal.

### Operator exclusivity

- 11** Does any operator have exclusivity, and if so, for which service(s), and for how long?

Since the full liberalisation of the telecoms market in January 2000 (fully implemented with the public tender regarding the issuance of licences for wireless access systems), there is no operator with rights of exclusivity regarding any kind of telecoms services.

### Radio frequency (RF) requirements

- 12** For wireless services (eg mobile), are radio frequency (RF) licences/permits required in addition to any telecoms services authorisations and is an RF licence available on a competitive or non-competitive basis? Is RF frequency the subject of auction or tradable in any circumstances?

To the extent that the application for a licence for wireless services (eg mobile) involves the use of radio frequencies, such licences must be preceded by a public tender (see question 5). In such cases, RFs are allocated within the framework of such licensing procedure. In all other situations, RFs are granted by the ICP-ANACOM on a non-competitive basis. RF is not subject to auction but can be traded provided the ICP-ANACOM grants prior authorisation.

### Third generation services

- 13** Is there any regulation for the specific roll-out of third generation mobile services (eg in terms of licences, standards etc)?

Yes. The terms and conditions applicable to the roll-out of third generation mobile services are thoroughly regulated both on the laws and regulations that established the public tender for the issuance of the UMTS licences in Portugal and in the text of the licences issued.

Besides the term for the commercial start up of the UMTS services (currently set forth for December 2003), the terms of UMTS licences include provisions on standard interfaces to be used, the number of control centres and base stations that need to be set up and respective timetable, electromagnetic field limitations, number portability and interconnection, geographic areas to be covered, transfer of licence conditions, general policy on prices and tariffs, safety measures, etc. In addition, the winning operators for the UMTS licences are also bound to the additional commitments made by each of them in the context of their application to the UMTS licences in the public tender.

### Modification/assignment of licence

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

Licences may be modified in the following cases:

- at the ICP-ANACOM's initiative, following any additional legal requirements approved after the relevant licence was granted; or
- at the licensee's request, which will have to be duly justified and subject to the ICP-ANACOM's authorisation.

Licences can be assigned with the prior authorisation of the ICP-ANACOM, or the Minister of MSE in the case of a public tender. The assignee must comply with all the requirements established in the law or the tender regulation, and assume all the rights and obligations established in the licence.

Although it is theoretically possible for such licences to be pledged, owing to the strong limitations on the transfer of the licences they are seldom used as security for financing purposes.

Recently the Lisbon Commercial Court ordered an injunction against one of the Portuguese UMTS licensees that involved the pledge of its UMTS licence. This decision has been appealed for illegality and is now pending final decision.

### Convergence

- 15** Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT?

Although no specific amendments were made to telecoms-specific regulation to take account of the convergence of telecoms, media and IT, the most recent regulations approved regarding technologies applicable to the different sectors have usually taken into consideration the convergence between these areas. Such is the case in the regulation of cable networks, UMTS services and digital video broadcasting for terrestrial television.

In this area, it is important to note that on 2 June 1999, the ICP-ANACOM created a 'working party' (Plataforma de Desenvolvimento e Convergência), constituted of several representative entities, with the purpose of discussing matters

towards the convergence between sectors directly connected to telecoms. On 15 May 2002 this working party presented to the Portuguese government a number of proposals for actions aiming to contribute to the definition of a strategy towards the convergence of the media and telecom areas.

However, the telecoms sector, the audio-visual sector (broadcasting services) and the Internet are still regulated separately.

### Audio-visual sector

**16** Is the audio-visual sector and/or content regulated separately from telecoms?

The Basic Law of Telecommunications expressly excludes from its applicability all kinds of broadcasting services (eg radio and television). Radio and television broadcasting are regulated by a number of specific laws and regulations.

### Cable networks

**17** Is there any restriction in your country regarding ownership of cable networks, in particular by telecoms operators?

There are no restrictions regarding ownership of cable networks.

### Local loop

**18** Is there any specific rule in your country regarding access to the local loop or providing for local loop unbundling?

No. However, following the EU recommendations concerning measures to be implemented in order to facilitate the process towards total liberalisation of the local loop at national level, ICP-ANACOM approved on 13 March 2003 a number of amendments to the general offer regarding the access to the local loop (*Oferta de Referência para Acesso ao Lacete Local* or ORALL) of the incumbent operator, Portugal Telecom (through its subsidiary company PT Comunicações SA). These amendments introduce several specific information, technical and quality requirements that the incumbent operator has to comply with in order to facilitate the access to the local loop by other operators. Several new obligations aiming to simplify the application procedure were also imposed.

### Changes to telecoms law

**19** Are any major changes planned to the telecoms laws of your country?

There have been several changes in the Portuguese telecom legal framework in recent months. These changes were caused by the sale of the basic telecom network by the Portuguese state to the incumbent operator (which, among other changes, has caused the amendment of the public service of telecommunications regime), the revocation of one of the UMTS licences issued by request of the operator, distribution of the available spectrum by the remaining operators and the announced revocation of the licence regarding the setting up of digital video broadcasting for terrestrial television. On this latter case, it is likely that new rules will be approved to establish the terms and conditions for the issuance of this type of licence.

In addition, the implementation of the EU Directive on information society services and e-commerce is under process;

the Council of Ministers having approved of 20 February 2003 a proposal to be presented to the Parliament to allow the government to make such implementation itself.

Amendments to the digital signature and electronic documents act are also expected following a decision of the Council of Ministers of 29 January 2003.

During this year future legislative developments should follow in order to adapt and implement a number of Directives on Telecoms adopted by the Council of Ministers of the EU on 14 February 2002 (the Telecoms Package). Among other things, the Telecoms Package sets forth significant changes to the way national telecoms regulators will have to assess operators having a significant market share and their inherent obligations.

## REGULATOR

### Regulatory agencies

**20** Which body or bodies are regulatory agencies for which purposes?

The ICP-ANACOM is the authority that grants the licence or confers registration, except when the use of frequencies is involved. In this latter case, the licence must be preceded by a public tender and is granted by the Ministry of Social Equipment (MSE).

The ICP-ANACOM, as the telecoms regulator, advises the government on telecoms policy and legislation and monitors compliance with concessions, licences and permits granted to telecoms providers. Among the ICP-ANACOM's responsibilities are:

- representation of the Portuguese government in international organisations;
- standardisation and approval of terminals and other communications equipment;
- management and supervision of the radio spectrum;
- issuance of licences to various types of service providers and network operators;
- registration of telecoms operators not subject to licensing;
- the definition of interconnection conditions when entities with significant market power are involved; and
- to approve regulations whenever necessary to exercise its powers.

The ICP-ANACOM is also responsible for the planning of frequencies in accordance with the following criteria:

- availability of radio-electric spectrum;
- guarantee of effective competition in the relevant markets;
- effective and efficient use of the frequencies.

By the end of the first quarter of each year, the ICP-ANACOM must publish the planning of frequencies, indicating the frequencies and number of channels granted to licensed operators, the frequencies reserved and to be made available in the next year and a summary of the procedures for the allocation of frequencies, indicating specifically the frequencies which have to be granted by public tender.

## Establishment of regulator

- 21** How is each regulator established and to what extent is it independent of network operation/services and of government?

The ICP-ANACOM is accountable to the MSE. The MSE retains basic responsibility for telecoms policy in Portugal. Over the past few years the government has substantially increased the autonomy of the ICP-ANACOM and allowed it to become a more effective and independent regulatory body.

## Appeal procedure

- 22** How may decisions of the regulator(s) be challenged or appealed and on what basis – merits, law and/or procedure?

The ICP-ANACOM's decisions and resolutions have to be challenged firstly to the minister of MSE before they can be appealed to the administrative courts. The MSE resolutions are directly appealed to the administrative courts. These decisions/resolutions can be challenged or appealed on the basis of breach of applicable legislation or procedures.

## Competition and telecoms regulation

- 23** To the extent that there is a national regulatory authority responsible for telecoms-specific regulation and a national competition authority responsible for general competition rules, what is the respective scope of their jurisdiction in the telecoms sector, and is there any mechanism under national law to avoid conflicting exercise of jurisdiction by the two authorities? Is there a specific mechanism to ensure the consistent application of competition and sector-specific regulation?

The ICP-ANACOM, as the national regulatory authority responsible for telecoms, does not have any specific responsibility or power regarding anti-competitive practices. All competition and merger control issues in the telecoms sector (as with any other sector) are dealt with by the minister in charge of trading and the Office of Trade and Competition (Direcção Geral de Comércio e Concorrência, or DGCC).

## Interception

- 24** Are there any special rules requiring operators to assist Government under certain conditions in interception of telecommunications messages?

Yes. According to Decree Law 290-B/99 of 30 July 1999 which, among other things, sets forth the rules applicable to the running of public telecommunications networks, operators of such networks are obliged to install, at their own expense and to assist the duly authorised authorities, with systems capable of legal interception of communications, and to provide the means for the decrypting or decoding of communication when the encryption or coding of messages is used or provided by the operator.

In any case, according to the Portuguese Code on Criminal Procedure, the interception of communications is generally subject to courts' decisions (and not to the government).

## SERVICES

### Internet services

- 25** How are Internet services, including voice over the Internet, regulated?

At present, there is limited Portuguese and EU legislation specifically covering the provision of Internet services, although there are laws and regulations relating to certain specific aspects of Internet activities, including the use of domain names, digital signatures, electronic invoices and data protection. In addition, the EU adopted the E-Commerce Directive, which sets out basic principles for regulating electronic activities in the EU and which is currently pending implementation in Portugal.

As a general rule, Internet operators are subject to the registration procedure set forth in Decree Law 381-A/97 of 30 December 1997. Under this law, domain names intended for use in Internet activities must be registered. At present, there is also no regulation applicable to the use of voice over the Internet.

### Interconnection

- 26** How is interconnection regulated? Can the regulator intervene to resolve inter-operator disputes? Are wholesale (interconnect) prices controlled? What are the basic interconnect tariffs?

Interconnection regulation is specifically addressed by Decree Law 415/98, implementing Directive EC/97/33, which contains the rights and obligations of different categories of operators and service providers and grants the ICP-ANACOM a wide range of powers to intervene in dispute resolution or by its own initiative and to fix *ex-ante* conditions, in particular where operators with significant market power are involved. The decree law imposes specific obligations concerning cost-orientation principles for inter-connection tariffs and the publication of reference inter-connection offers, which are subject to specified minimum elements defined by the ICP-ANACOM and subject to its review.

### Retail tariffs

- 27** Are retail tariffs regulated and, if so, which and how?

Telecoms operators other than PT are free to establish the prices for their services. PT entered into a pricing convention with the ICP-ANACOM and the DGCC, the commerce and competition agency, which established price caps on PT's prices for fixed telephone services (ie installation charges, line rental fees and prices for domestic and international telephone calls), leased lines and telex. These prices must be transparent, cost-oriented and non-discriminatory and must be published in the *Official Gazette*.

### Customer terms and conditions

- 28** Are customer terms and conditions required to be filed with and/or approved by the regulator?

Yes. A draft of customer terms and condition used by each telecoms operator must be subject to approval by the ICP-ANACOM.

**COMPETITION AND MERGER CONTROL****Competition law in the telecoms sector**

**29** Are anti-competitive practices in the sector controlled by regulation or general competition law and by which regulator and/or competition authority?

Anti-competitive practices are expressly prohibited in the Basic Law of Telecommunications and are controlled by general competition law authorities. The competition authorities are empowered to control anti-competitive practices.

**Regulatory thresholds for telecoms M&A**

**30** What are the criteria and thresholds for regulatory or competition law review of telecoms sector mergers, joint ventures and acquisitions?

The criteria and thresholds for telecoms mergers, joint ventures and acquisitions are the same as for other sectors. The competition law provides two alternative thresholds based on market share and turnover. Competition law applies where:

- a market share above 30 per cent of the national market, or a substantial part thereof, of a given product or service is acquired or increased; or
- the aggregate turnover in Portugal of the companies involved exceeds PTE30,000 million (approximately €150 million) during the last financial year, net of taxes directly related to the turnover. The substantive criteria for clearance are a positive financial balance and the international competitiveness of the companies involved.

**Regulatory authorities for telecoms M&A**

**31** Which are the regulatory and/or competition authorities responsible for such review?

The authorities responsible for such review are the minister in charge of trading and the DGCC. Before taking a decision the minister may request advice to the Competition Council.

**Procedure and timescale for telecoms M&A**

**32** What are the procedures and associated timescales for review and approval of telecoms mergers and acquisitions?

The notification is submitted to the DGCC, which has 40 business days to submit it to the minister for a decision. The minister has 50 business days to decide or to request advice from the Competition Council. The Competition Council has 30 days to give advice to the minister, who in turn has 15 days to make a decision. Therefore, if advice from the Competition Council is not required by the minister, a decision could be taken within 90 business days from the notification of the transaction. If the advice of the Competition Council is requested, the delay increases to 135 business days.

*Morais Leitão & J. Galvão Teles*  
*A s s o c i a d o s*

S O C I E D A D E D E A D V O G A D O S

**CONTACT: FILIPA ARANTES PEDROSO**

RUA CASTILHO, 75 – 1º  
 1250-068 LISBOA  
 PORTUGAL

TEL: +351 21 381 74 28  
 FAX: +351 21 381 74 99  
 E-MAIL: FAPEDROSO@MLGT.PT