
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

FOURTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

Fourth Edition

Editor
JOHN P JANKA

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EDITOR'S PREFACE

The pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today's world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a 'light touch' in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation

of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address 'network neutrality' concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

This fourth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern these types of issues in 30 jurisdictions around the world. In the space allotted, the authors simply cannot address the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

John P Janka

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October 2013

LIST OF ABBREVIATIONS

3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb

List of Abbreviations

FTTH	Fibre to the home
FTTN	Fibre to the node
FTTx	Fibre to the x
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling-public call offices
UAS	Unified access services
UASL	Unified access services licence

List of Abbreviations

UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access

Chapter 20

PORTUGAL

Joana Torres Ereio, Joana Mota and Raquel Maurício¹

I OVERVIEW

The TMT sector in Portugal has undergone considerable changes over the past few decades. The liberalisation of the communications sector in the 1980s was followed by the separation in 1992 of telecommunications from the postal service's operations, now in the hands of CTT, a state-controlled company, and by the subsequent and phased privatisation of the main Portuguese telecommunications operator, Portugal Telecom (PT), which retains approximately two-thirds of the voice market and leads the mobile communications and internet sectors. After this phase of liberalisation and the intense market growth and competition that followed, the TMT sector was driven by the globalisation of the Portuguese economy. This led to the general globalisation of domestic players, with the increasing internationalisation of operators, enabling them to develop higher capacity and leading to and strengthening international alliances. Furthermore, it led to significant investment by foreign players in the Portuguese market, as well as to investments by both foreign and national players in Portuguese-speaking markets considered as adjacent. An example of this move is the sale by PT of its 60 per cent joint venture stake in Brazil's largest mobile operator, Vivo, to Telefónica in 2010. PT has, however, reinvested in 2011 in the Brazilian market by acquiring a 25.6 per cent stake in Oi, a communications company whose business segments are very much in line with those of PT's own domestic operations. On the other hand, the increasing presence of Portuguese TMT companies, especially PT and ZON, in African Portuguese-speaking markets is also of note. Those two major players have been investing, together with African companies, and mainly in the mobile sector, in Angola, Mozambique, São Tomé

¹ Joana Torres Ereio is a senior associate, Joana Mota is a junior associate and Raquel Maurício is a trainee lawyer at Uría Menéndez – Proença de Carvalho.

and Príncipe and Cape Verde, but also in satellite television in Angola and Mozambique through the ownership of Unitel and Zap, respectively.

The Portuguese communications sector now has a state-of-the-art network following an increasing trend towards globalisation. The specific situation depends, however, on the particular market. In the fixed telecommunications industry, ever-increasing competition has led to market saturation and a phenomenon of customer defection. As a result, it is now the mobile sector that is considered to be the strongest in the sector, with an average penetration rate among the highest in Europe and with all operators having launched 3G and 4G services. Consequently, the number of customers using mobile internet services has increased over the past few years. The market is controlled by a triopoly of mobile network operators: TMN (a subsidiary of PT), Vodafone and Optimus, together with two major mobile virtual network operators: CTT, which uses TMN's network, and ZON, which uses Vodafone's network.

The internet has been widely used since 2002 by the general public. In 2012, 45 per cent of Portugal's population were internet users.

Basic broadband coverage in Portugal was above the EU average and, as regards the coverage of high speed networks, Portugal ranked seventh in the EU at the end of 2012. Also at the end of 2012, the number of access points to broadband internet at a fixed location was 2.4 million (6.6 per cent higher than in 2011).

In 2012 the total revenues for internet access services (either standalone or multiple play packages) amounted to €987 million, 2.2 per cent higher than in the previous year, due to the increase in revenues from the triple play sector (which represented 76.3 per cent of total revenues).

The market has several players, the top five being PT, ZON, Optimus Sonaecom, Cabovisão (which was sold in 2012 by Cogeco Cable, Inc to the ALTICE Group) and Vodafone Portugal. In 2012, the market's growth was primarily due to the offer of internet access through fibre-optic connections. ADSL suffered a fall, although it remains the main access technology in Portugal. PT is the leader in fixed and mobile internet access (through TMN). Market penetration in Portugal is 58.8 per cent in the multiple play sector, 16.9 per cent in the double play sector and 41.9 per cent in the triple play sector.²

In the media sector, the television sector is particularly worthy of attention, where there is special emphasis on packages where television has a prime role.

This trend may explain why 93 per cent of the telecommunications packages include television – above the European average, which is estimated at about 48 per cent. According to the most recent data, the number of subscribers to triple or quadruple play offers is 44 per 100 inhabitants and the penetration rate of double play offers is 16 subscribers per 100 inhabitants. The total revenue from subscription TV services (including stand-alone and bundled services) amounted to €1.24 billion in 2012. This places Portugal in eighth place in the ranking of EU Member States. As for triple play packages, Portugal was ranked fourth in terms of subscribers per 100 inhabitants (only Luxembourg, France

2 All statistical information contained in Section I is taken from ICP-Anacom's 2012 report, which can be found at www.anacom.pt/streaming/sector_das_comunicacoes2012.pdf?contentId=1168308&field=ATTACHED_FILE.

and the Netherlands ranked higher than Portugal). According to information collected from electronic communications providers, the number of subscribers to bundled offers reached 2.4 million in 2012.

There are currently four national and two regional free-to-air terrestrial channels, with plans to introduce a fifth national terrestrial channel to broadcast on the DTTV platform still being delayed. The Portuguese state is still an operator in the media sector through RTP, the public service broadcaster, which controls several terrestrial television channels (including the channels RTP 1 and RTP 2) and three national radio stations. The first two private television channels were launched between 1992 and 1993 and, despite the monopoly formerly held by the Portuguese public broadcasting channels, private channels soon led audience ratings and encouraged Portuguese-produced programmes. Furthermore, there are over 3.12 million subscribers of pay-TV, which is controlled by ZON, and by PT's competing service, Meo TV. In the first quarter of 2013, PT launched the first quad-play offer (M4O), which was then followed by Vodafone (Red) and ZON (Iris 4+).

Finally, in the mobile telephone sector, the number of subscribers increased by 0.2 per cent to 16.8 million with revenues of €2.24 billion.

The telecommunications market is expected to change significantly in Portugal during the course of 2013, with the announced merger of ZON (the largest cable operator) with Optimus (the third mobile operator, owned by Sonaecom). This transaction will create a new integrated telecom operator in Portugal that will increase its focus on bundled offers from triple to quadruple play, thus becoming a real competitor for PT's quadruple play offer (M4O).

Following Portugal's bailout in 2011 and the execution of a memorandum of understanding with the 'troika' of the European Commission, the International Monetary Fund and the European Central Bank, the government implemented several recessionary measures as a way to reduce Portugal's sovereign debt. These measures have involved higher tax rates, a reduced budget for government-subsidised institutions and a generalised cut in public sector wages.

As a consequence, families' disposable income is lower than in 2011 and 2010, which leads to less consumption. This has had a direct impact on the economy and therefore the TMT sector. However, operators are urged to respond more effectively to the demands of consumers, who nowadays have more personal devices and are demanding far more digital contents. Offering mobility, multiple and adapted offers for different population groups and speed at competitive prices are the current challenges for the sector.

II REGULATION

i The regulators

The key regulators in the TMT sector are the Portuguese National Telecommunications Authority (ICP-Anacom) and the Portuguese Regulatory Authority for the Media (ERC).

ICP-Anacom is the regulatory and supervisory entity for the communications sector, responsible for, *inter alia*, assisting the Portuguese government in the definition of strategic guidelines and policies for the communications sector and the activity of

communications operators, managing the radio spectrum etc. It should be noted that although its board of directors is appointed by the Portuguese government, ICP-Anacom maintains a certain level of independence as it is administratively and financially independent and free to exercise its powers without governmental intervention.

Media activity, on the other hand, is subject to the supervision of the ERC, a public body that, in a similar manner to ICP-Anacom, is administratively and financially independent from the government. Among its powers, the ERC is responsible for matters such as granting new licences to television and radio operators and promoting competition.

Despite not being considered as a regulator or a supervisory body specifically for the TMT sector, the Portuguese Competition Authority has also been particularly active over the past few years in matters connected to pricing and concentration in the telecommunications sector.

The main sources of the regulations applicable to the TMT sector are:

- a* the Constitution of the Portuguese Republic;
- b* the Electronic Communications Law, approved by Law 5/2004 of 10 February, as amended;
- c* the Essential Public Services Law, approved by Law 23/96 of 26 July, as amended;
- d* the Television Law, approved by Law 27/2007 of 30 July, as amended;
- e* the Radio Law, approved by Law 54/2010 of 24 December;
- f* the Electronic Commerce Law, approved by Decree Law 7/2004 of 7 January, as amended;
- g* the Data Protection Law, approved by Law 67/98 of 26 October;
- h* the Electronic Communications Protection Law, approved by Law 41/2004 of 18 August, as amended;
- i* the Advertising Code, approved by Decree Law 330/90 of 24 October, as amended; and
- j* the Competition Law, approved by Law 19/2012 of 8 May.

In addition to these regulations, the TMT sector is also subject to administrative orders, rulings, guidelines and recommendations issued by the government and the regulatory bodies.

ii Regulated activities

The provision of electronic communications networks and services is subject to a general authorisation regime, without the need for any prior decision or act of ICP-Anacom. According to this procedure, any entity intending to provide electronic communications or network services is required to submit to ICP-Anacom a short description of the services it wishes to provide, together with the details required, and give notice of the estimated date of the activity entering into operation.

In certain cases, a separate request for usage rights for frequencies and numbers must be submitted to ICP-Anacom, which will then grant those rights in accordance with the National Numbering Plan. The decision on the allocation of usage rights will be adopted, notified and made public within a specified period of time.

With regard to the television and radio sectors (excluding public services), the Television Law and the Radio Law, respectively, establish three different types of access to these activities, subject to obtaining a licence, authorisation or registration granted by the ERC.

First, access to both television and radio broadcasting activities may be granted upon the issue of a licence, by means of a public tender if the activity in question uses the terrestrial spectrum intended for broadcasting purposes under the National Frequency Allocation Plan, and also for television activity that consists of the organisation of unrestricted free-to-air television programme services or a selection and aggregation of conditional access television programme services or of free-to-air television programme services subject to a subscription.

In particular as regards television activity with unrestricted free-to-air television programme services, licences are granted on an individual basis, according to the number of television programme services provided by each television operator.

In the case of conditional access television programme services or of free-to-air television programme services subject to a subscription, two qualifying documents are granted in the scope of the same tender: one confers rights of use for radio frequencies or groups of frequencies involved, and the other confers rights of use for the selection and aggregation of television programme services to be provided by a distribution operator.

Second, access to both activities is subject to an authorisation in the event that they do not use the terrestrial spectrum intended for broadcasting purposes under the National Frequency Allocation Plan. In addition, the television activity is subject to a prior authorisation if it consists of the organisation of television programme services that are intended to integrate the offer of a distribution operator holding a prior licence for the selection and aggregation of conditional access television programme services or of free-to-air television programme services subject to a subscription.

Third, in some circumstances, both television and radio broadcasting activities may be subject to mere registration with the ERC if they consist of the broadcasting of television or radio programmes exclusively through the internet.

iii Ownership and market access restrictions

ICP-Anacom and the ERC, together with the Portuguese Competition Authority, are responsible for supervising the level of competition in the communications and media sector. ICP-Anacom is also responsible for identifying the relevant markets both at retail and wholesale level.

In the communications sector, ICP-Anacom may restrict the amount of frequency allocated to electronic communications services providers when necessary to ensure its efficient use, taking into account the maximisation of benefits to users and the need to foster competition. Also, and according to the Electronic Communications Law, ICP-Anacom may implement certain restrictions on the technology used for electronic communications services, as well as to the types of services to be rendered, in order to ensure technological and services neutrality, provided that the restrictions are proportionate and non-discriminatory. Apart from this, there are no specific rules restricting direct or indirect, domestic or foreign, ownership interests in electronic communications and network service providers.

Conversely, pursuant to the Television Law as amended by Law 8/2011 of 11 April, new regulations on the ownership and management of television operators were introduced in Portugal, some of which were also implemented by the Radio Law, as amended by Law 54/2010 of 24 December. For instance, no person or entity may hold (either directly or indirectly, including through other companies), a number of licences for the operation of free unrestricted nationwide television access equal to or above 50 per cent of the total amount of licences available on the market for the same range of programmes.

Also, pursuant to the Radio Law, an individual or company cannot directly or indirectly hold (1) more than 10 per cent of the total number of local radio licences available nationwide; (2) control of more than 50 per cent of the national radio programming services in the same coverage area and for the same band frequency; or (3) more than 50 per cent of the local radio programming services in the same coverage area.

Moreover, the change of domain both with regard to television operators and radio broadcasting operators may now only occur three years after the original granting of the licence, two years after the modification of the approved project or one year after the latest licence renewal, and is subject to authorisation by the ERC.

Finally, concentrations between radio operators or television operators subject to the intervention of the Portuguese Competition Authority will be subject to a prior opinion from the ERC. This opinion will only be binding if it is based on a reasoned risk to the freedom of expression and exchange of views.

A final comment to note on market access restrictions is that under the Television Law and the Radio Law, television and radio broadcasting activities consisting of the organisation of general services or thematic information (on a national, regional or international basis) may only be pursued by legal entities (the Television Law expressly limits these activities to companies and cooperatives), whose main activity is the performance of such services. Furthermore, new minimum capital stock thresholds apply to television operators that need to obtain a licence to provide television programme services.

iv Transfers of control and assignments

There is no express provision in law regarding the transfer of the offer of electronic communications and network services previously notified to ICP-Anacom. Such a transfer is therefore allowed as long as the operator provides those services effectively and efficiently and provided that ICP-Anacom is notified and informed of the transferee company.

Under the Electronic Communications Law, usage rights for numbers are transferable in the terms and conditions to be established by ICP-Anacom, which shall guarantee, in particular, the effective and efficient usage of numbers, as well as users' rights. Frequency rights may be either transferred or leased between companies, according to the conditions established for those rights and to the procedures set out in the Electronic Communications Law, provided that the transfer or lease is not expressly prevented by ICP-Anacom and made public in the National Frequency Allocation Plan. For these purposes, the holders of rights of use must notify ICP-Anacom of their intention to transfer or lease the rights, as well as of the conditions under which they intend the

transfer or the lease to be carried out. ICP-Anacom must respond to the notification within a period of no more than 45 days and may oppose the intended transfer or lease of usage rights, or impose any necessary conditions to ensure that the transfer or lease does not lead to a distortion of competition.

Conversely, neither the licences nor the authorisations granted for television activities may be transferred to a third party. Under the Radio Law, it is possible to transfer both local programme services and the respective licences or authorisations under certain conditions. Without prejudice to the powers granted to ICP-Anacom in the regulations applicable to electronic communications networks and services and to radio communications, these transfers depend on an authorisation from the ERC.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

IP-based services were historically regulated by the general regulations on messaging content, and thus were not subject to a separate regulatory structure. As a consequence of the developments in EU law and the entering into force of the Electronic Communications and Electronic Commerce Laws in 2004, internet and IP-based services became subject to specific legal regimes and regulatory frameworks, in both cases supervised by ICP-Anacom. The legal classification of these services will likely continue to evolve as new technology is made available, as has been seen with the debate surrounding VoIP services in Portugal.

ii Universal service

The Council of Ministers Resolution 135/2002 of 20 November established the institutional framework of governmental activity regarding the information and knowledge society and approved the National Initiative for Broadband, which aimed to enlarge the broadband user base and, as a result, increase the level of productivity and competition in the Portuguese economy.

The Council of Ministers Resolution 120/2008 of 30 July determined that investment in new generation networks (NGNs) is a strategic priority for Portugal as far as the electronic communications sector is concerned, and established the government's strategic guidelines for NGNs.

2009 was also an important year in the construction of the broadband framework in Portugal, with Decree-Law 34/2009 of 6 February and Law 10/2009 of 10 March, both as amended, aiming to promote economic growth and employment, and establishing tax benefits for the modernisation of technological structures or next-generation broadband networks. Also in 2009, the government passed Decree-Law 123/2009 of 21 May governing the construction of infrastructure suitable for the accommodation of electronic communications networks.

In line with the priorities set out in the Digital Agenda for Europe and the Europe 2020 Strategy, Portugal's National Agenda, established by Council of Ministers Resolution 112/2012, envisages the active involvement of civil society and the private sector, especially in the information and communication technologies (ICT) sector. It entails the launch of a raft of initial measures to be implemented by 2016 in the following

six action areas: (1) broadband access and access to the digital market; (2) investment in research and development and innovation; (3) improving digital literacy, inclusion and qualifications; (4) combating tax and contributory fraud and evasion; (5) addressing societal challenges; and (6) entrepreneurship and internationalisation in the ICT sector.

As a result of this, according to the 'eGovernment Benchmark 2012' report published by the European Commission,³ Portugal ranked first in the European tables for the sophistication and availability of its online public services. The European Commission highlighted Portugal as having an advanced e-government infrastructure, providing many services completely online that appear to follow the example set.⁴ Overall, the deployment of broadband infrastructure and the availability of broadband internet connections are still being strongly encouraged by the government. According to ICP-Anacom's latest available data,⁵ in the first trimester of 2013, 3.5 million users in Portugal logged on to mobile broadband internet, and there were about 2.4 million customers with access to fixed internet, 936,000 of which used modems. The main technology for broadband internet access is still ADSL, which accounts for 45.1 per cent of all fixed broadband access, even though the highest increase has been observed in access by optical fibre.

Also, according to data made available by the Organisation for Economic Cooperation and Development (OECD),⁶ in December 2012 Portugal ranked 19th for total percentage of fixed broadband subscriptions among the 34 countries that form part of the OECD, with a total of 22.5 subscribers per 100 inhabitants, and 22nd in terms of total percentage of wireless broadband subscriptions, with a total of 41.6 subscribers per 100 inhabitants. The OECD's data further showed that Portugal ranked 14th among EU countries with the most broadband wireless connections, ahead of countries such as Belgium and Ireland.

iii Restrictions on the provision of services

ICP-Anacom monitors and controls wholesale, international roaming services and interconnection and termination prices, imposing limits and remedies, as applicable.

Without prejudice to other conditions established by law, entities that provide publicly available electronic communications or network services may be subject to several general conditions.

Among these, we should highlight the operators' rights and – when requested by other undertakings – obligations to negotiate with each other for the purpose of

3 Available at <http://ec.europa.eu/digital-agenda/en/ict-enabled-benefits-eu-society-analysis-and-data>.

4 According to the European Commission Government Benchmark 2012, the Portuguese Agency for Public Services Reform (AMA) has developed a 'one-stop shop' business portal. With an electronic ID card (Company Card), which enables electronic authentication and an electronic signature, the entrepreneur has online access to all kinds of services and the business-creation process is totally integrated and dematerialised.

5 Available at <http://www.anacom.pt/render.jsp?contentId=1162197>.

6 Available at <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm>.

providing publicly available electronic communications services to ensure the provision and interoperability of services.

Operators are also required to ensure the rights of users of electronic communications services, notably the right to equal access to the services provided. However, in some circumstances, providers may refuse to enter into a contract with a subscriber who has not settled amounts due for previous contracts with the same or another provider.

There are also restrictions on content monitoring that are established in general terms by the Data Protection Law, the Electronic Communications Protection Law and the Portuguese Criminal Code. These all prohibit any type of unlawful monitoring of content, network user surveillance and interference with privacy. Indeed, evidence obtained by any violation of privacy, home, correspondence or telecommunications, without the consent of the interested party, is generally considered null and void under Portuguese law.

Furthermore, according to the Data Protection Law, the main criteria for making any data processing legitimate is the unambiguous consent of the data subject, who, following the data collection, must at all times have the right to access his or her own data and to object in certain cases, upon request and free of charge, to the processing of such personal data. The processing of personal data must also be limited to specific purposes, and the processing of sensitive data is restricted to limited situations. The monitoring and processing of data of network users must therefore comply at all times with these principles, and will be monitored by the Data Protection Authority, an independent agency that responds directly to Parliament.

iv Security

As a preliminary remark, it should be noted that the right and freedom of access to public information is protected under the Portuguese Constitution.

Notwithstanding the foregoing, freedom of access to information does not take precedence over the criminal rules on judicial secrecy, according to which, during the course of a criminal investigation, neither the police nor the suspects can reveal any information regarding the investigation, including details about potential suspects.

Furthermore, Law 6/94 of 7 April (approving the Law on State Secrecy), establishes certain cases where information may not be disclosed. Similar limitations are provided in the Law on the Access to Administrative Documents (approved by Law 46/2007 of 24 August), according to which information may be withheld for reasons of internal or external security, judicial secrecy and personal privacy.

Finally, cyber security was also reinforced in Portugal by legislation passed in 2009: Law 109/2009 of 15 September (the Cybercrime Law), laying down the substantive and procedural criminal law in relation to cybercrime and the collection of electronic evidence. The Cybercrime Law transposed Council Framework Decision 2005/222/JHA of 24 February into Portuguese law.

IV SPECTRUM POLICY

i Development

ICP-Anacom is responsible for monitoring and controlling the radio spectrum in Portugal with the primary objective of ensuring that all networks and radio stations operate without harmful interference, as well as planning frequencies in accordance with several criteria, such as the availability of the radio spectrum, the guarantee of conditions of effective competition in relevant markets and the effective and efficient use of frequencies. ICP-Anacom is also required to allocate and assign frequencies according to objective, transparent, non-discriminatory and proportionate criteria.

ii Flexible spectrum use

At the beginning of 2010, ICP-Anacom gave a signal to the market regarding GSM/UMTS 'spectrum rearming' (i.e., the flexible use of the 900/1,800MHz spectrum), by expressing a desire for greater efficiency and wider coverage implementation; this ultimately benefits consumers, mainly in relation to broadband access.

In this context, on 8 July 2010 ICP-Anacom decided to unify the conditions applicable to the exercise of rights of use of frequencies allocated to the operators TMN, Optimus and Vodafone Portugal under a single title for the provision of land mobile service (GSM and UMTS).

Following this multiband auction, ICP-Anacom approved the issuance of unified titles of rights of use of frequencies for terrestrial electronic communication services to Optimus, TMN and Vodafone Portugal.

iii Broadband and next-generation mobile spectrum use

The growing need for spectrum for broadband services and next-generation mobile services in particular was addressed by the Council of Ministers Resolution 120/2008 of 30 July, where the promotion of the investment in NGNs was included as a national priority.

Along these lines, Decree Law 34/2009 of 6 February, as amended, established exceptional public procurement measures that apply to restricted pre-qualification procedures or to direct award procedures targeted at the conclusion of public works contracts with special relevance for next-generation broadband networks.

Furthermore, Administrative Regulation 829/2010 of 31 August, as amended, recognised that broadband connectivity is essential for the development of the economy and society and established a programme for the development of next-generation broadband and networks in rural areas.

Finally, the auction for the 4G bandwidth mobile frequencies (LTE Broadband) took place in November 2011. It was hoped that this auction, which is also part of the requirements listed in the memorandum of understanding signed with the troika, would be the gateway to establishing new players, but instead only the three existing mobile operators made significant bids. Although ZON showed some interest at the beginning, it failed to make an offer. For further developments, see Section V.iv, *infra*.

iv Spectrum auctions and fees

ICP-Anacom is in charge of the management of the spectrum and the award of frequencies and numbers, both as regards electronic communications and the broadcasting of television and radio, and therefore, the management of spectrum auctions.

Fees for the assignment of frequency usage rights through auction or public tender are payable to ICP-Anacom in accordance with Administrative Order No. 1473-B/2008 of 17 December, as amended, and the relevant amount is determined on an *ad hoc* basis. ICP-Anacom raised €372 million with the auction for LTE frequencies. For further developments, see Section V.iv, *infra*.

V MEDIA

i Restrictions on the provision of services

As a general principle regulating the provision of television and radio services, the freedom of expression of opinion through television and radio incorporates the fundamental right of citizens to free and pluralistic information, which is considered essential in a democracy and for the social and economic development of the country.⁷

Moreover – and except for the cases provided for in the general rules – television and radio 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 force the broadcasting of any programmes. Without prejudice to these general rules, both the Television Law and the Radio Law set out some limits on the freedom of programming.

In this context, the ERC is responsible for encouraging television operators to prepare a common television programme rating system to implement signs identifying different target age groups based on programme content, in compliance with the decision of the rating commission. The Television Law further establishes particular rules for the protection of the Portuguese language, requiring television operators under the Portuguese jurisdiction to comply with a quota system. Pursuant to this system, national television programming services must generally reserve at least 50 per cent of their programming time for programmes in Portuguese, excluding the time allocated to advertising, sales and teletext services; 25 per cent of these Portuguese-language programmes may originate from Portuguese-speaking countries other than Portugal. These percentages will not apply to thematic programming services to the extent compliance is not possible due to the particular nature of the services; however, in such cases, programming services will still be required to reserve at least 20 per cent of their programming time for Portuguese-language programmes.

These quotas thus apply to any programming services with national coverage, including programming services of a thematic nature, either of free, conditional or

⁷ According to the 2013 ranking prepared by Reporters Without Borders regarding press freedom, Portugal ranked 28th in the list of the 179 countries analysed. The full report is available at <http://en.rsf.org/press-freedom-index-2013,1054.html>.

limited access, which are made available by television operators acting in and under Portuguese jurisdiction.

The Radio Law also sets out restrictions similar to those established in the Television Law in order to promote the Portuguese language. In particular, music programming of radio programme services must include a minimum quota of Portuguese music ranging from 25 per cent to 40 per cent. This quota must include at least 35 per cent of music whose first phonographic edition or public broadcast took place within the previous 12 months and at least 60 per cent of music composed or performed in Portuguese by citizens of Member States of the EU.

ii Digital switchover

The introduction of DTTV was one of the objectives set out in the government's programme for 2009 and Council of Ministers Resolution 12/2008 of 22 January, underlining the strategic importance of a rapid change to digital transmission. Given the need to comply with EU guidelines on the switch-off of the analogue television broadcasting system in 2012, it was decided that the termination of terrestrial analogue television transmission in all parts of the country would occur no later than 26 April 2012, and that ICP-Anacom would be responsible for promoting the necessary conditions to ensure a successful transition.

In its decision of 24 June 2010, ICP-Anacom approved the switch-off plan in compliance with the Resolution of Council of Ministers 26/2009 of 17 March. The switch-off plan consisted of three phases:

- a* first phase: 12 January 2012 (first stage), followed by four stages, on 23 January 2012, 1 February 2012, 13 February 2012 and 23 February 2012;
- b* second phase: 22 March 2012; and
- c* third phase: 26 April 2012.

In the first phase, the homes located in the municipalities in the coastal area of the mainland started receiving digital signals between 12 January and 23 February 2012; the second phase was carried out on 22 March 2012 for homes located in the autonomous regions of Madeira and the Azores. Finally, homes located in the more inland municipalities of mainland Portugal started receiving television transmissions in digital format on 26 April 2012. The whole Portuguese territory now has full DTTV coverage.

According to the final report by the Digital Television Migration Monitoring Group dated 8 November 2012, which was submitted to the government, the final assessment of the transition from analogue to digital was very positive.⁸

iii Internet-delivered video content

Internet-delivered video content has been subject to intense discussion, considering that in Portugal – as in most of the world – such content is now widespread, affecting traditional content providers and authors who have difficulties in controlling and

8 The full report can be found at: www.anacom.pt/streaming/GAM-TD_25+out2012.pdf?contentId=1142587&field=ATTACHED_FILE.

being compensated for the transmission of such content over the internet. In fact, notwithstanding the Portuguese Copyright and Related Rights Code, which ensures the protection of technological measures, Portuguese law has not yet implemented any specific regulations for the protection of intellectual property and related rights in internet-delivered works. Additionally, the existing compensation mechanism for authors and producers does not cover digital reproductions. Indeed, Law 62/98 of 1 September, as amended by Law 50/2004 of 24 August, establishes an amount to be included in the retail sale price of mechanical, chemical, electronic or other appliances, and of digital or analogue virgin material media, as well as of recordings obtained from such media, with the exception of digital recordings.

At the European level, the mediation process on private copying and reprography levies was initiated by Michel Barnier, the Commissioner in charge of intellectual property, who appointed António Vitorino as the Mediator for such process. In his initial statement, dated 31 January 2013, the following issues were identified: (1) methodology for setting levy tariffs; (2) cross-border sales; (3) determination of the person or entity liable to pay the levy; (4) visibility of the levy; and (5) private copying and reprography in the context of new digital forms of distribution of copyright-protected content and the implications for levy systems. This mediation process was concluded in January 2013, although these issues are still under discussion.⁹

iv Mobile services

The growing demand for mobile broadband internet is putting pressure on the flexibility of the spectrum. The government's digital agenda contains new measures for making more spectrum available – the Digital Dividend policy – for new mobile services.

The increasing need for spectrum for broadband services and next-generation mobile services in particular was addressed by Council of Ministers Resolution 120/2008 of 30 July, where the promotion of investment in NGNs was included as a national priority.

In this context, ICP-Anacom launched an auction for the 4G bandwidth mobile frequencies, which took place in November 2011. All three mobile phone operators managed to obtain new frequencies. As a result, ICP-Anacom obtained revenues of €372 million, which is less than the €400 million that the government expected to get from that auction.

At the end of 2012, PT announced that the 4G LTE technology covered 90 per cent of the Portuguese territory.

VI THE YEAR IN REVIEW

It would be impossible to review the past year in Portugal without taking into consideration the troika's memorandum of understanding and the implementation of austerity measures. Portugal has entered its third year of economic adjustment and

⁹ The full report can be found at: http://ec.europa.eu/commission_2010-2014/barnier/headlines/news/2013/01/20130131-2_en.htm.

an additional year has been added to the time scale, meaning that the bailout is now expected to end in 2014.

That said, a significant number of reforms have already been implemented, which have had an inevitable impact on the economy, including the TMT sector.

Under the economic and financial adjustment plan, the government finally launched tenders for the selection of providers of universal electronic communications services in Portugal (public pay phones, printed phone directories and directory information services and accessible phone lines at fixed locations), following Portugal's conviction in 2010 by the European Court of Justice for breaching the EU's universal service rules¹⁰. In July 2013, the government announced that Optimus and ZON had won the tender, and were awarded, respectively, the north and centre of Portugal for €7 million, and the south and islands for €4.9 million.

The media sector is also being affected by the adjustment measures. On the one hand, the controversial privatisation of one of the two public channels (RTP) was indefinitely postponed at the beginning of 2013 and RTP is currently being restructured. On the other hand, two new cable TV channels have recently been launched: one by Media Capital (TVI Ficção) and another by Cofina, a major editorial group in Portugal (Correio da Manhã TV), and ZON agreed to transfer to PT a 25 per cent share in Sport TV, a major player in the sports rights market (this transaction is currently under analysis by the Portuguese Competition Authority); these are both signs that the market is trying to recover. Another positive sign was the release by ZON of a new service (Timewarp), which allows users to record broadcasted programmes on a remote disk for a seven-day period. This new recording system, based on Advanced Personal Cloud Recording Technology, was the first in the market that did not need a set-top box and a local disk. Due to its innovative features, it has received awards in Portugal and was a candidate for the Cable Europe Innovation Award.

The telecommunications market is also facing some significant changes. To start with, the merger between ZON and Optimus (Sonae Group), announced at the end of 2012, was approved by the Portuguese Competition Authority in July 2013, subject to the implementation of measures by both companies. This transaction is expected to improve competition in the Portuguese market in all sectors of pay TV, fixed voice, broadband operation and mobile services.

In August 2013 the Portuguese Competition Authority also approved the acquisition of ONI by ALTICE, which had already acquired Cabovisão in 2012 and confirms its investment intentions in Portugal.

The relations between PT and the Brazilian Oi have also been in the news lately, with Zeinal Bava, former CEO of PT, assuming the leadership of Oi and unconfirmed

10 In short, the European Court of Justice considered that Portugal transposed incorrectly Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), since it decided to award the universal service until 2025, on an exclusive basis, to PT, without having launched a public tender (Case C-154/09 of 7 October 2010).

rumours of a merger between the two companies (which would result in a company with 101 million clients).

The privatisation of CTT, the national postal service provider, has also been on the table, with the privatisation model having been recently approved and the government expecting to receive proposals from interested parties by the end of the year.

In addition, Lycamobile, the largest global provider of international mobile calls, launched its low-cost services in Portugal in September 2012.

As to the legal framework governing the TMT sector in 2013, the reforms arising from the legislation approved in 2011 and 2012 are still being implemented and no other significant changes occurred.

Law 46/2012 of 29 August, which established the long-awaited opt-in rule regarding the use of cookies in websites, is now being dealt with more seriously by operators as they are now more aware of the importance of data compliance, data protection and data breaches.

Moreover, Law 55/2012 of 6 September, governing public investment in film writing and production, establishes innovative measures to fund the audiovisual sector: at least 4 per cent of advertising revenues obtained by cinema and television services providers from advertising companies is to be handed over monthly, and an annual contribution of €3.50 per subscription to access new TV services, is to be paid by pay-TV operators. The necessary regulations in order for this Law to effectively enter into force were recently approved.

Furthermore, the information tool 'COM.escolha', launched in 2011, registered around 17,371 visits in the second quarter of 2013. Consumers may use it to consult tariffs and it is aimed to stimulate growth in the use of the internet, television, mobile or fixed telephone services; it is also expected to promote competition in the retail TMT sector.

Finally, in May 2013 the European Parliament unanimously approved a motion for a resolution on a roaming-free Europe by 2015. This is one of the main measures designed to create a genuine single digital market.

VII CONCLUSIONS AND OUTLOOK

Looking ahead, some of the major changes announced for the TMT sector for the coming year are bound up in Portugal's bailout package, as the government intends to ensure more effective competition in this sector.

In particular, the government is expected to facilitate market entry by awarding access to new players by way of spectrum auctions, thereby lowering mobile termination rates.

Some interesting topics to follow in the coming year will be the privatisation of one of the two public television channels and the privatisation of CTT, the national postal service, which has been postponed but is expected to take place by the end of 2013 (the model for this privatisation was approved by the Resolution of the Council of Ministers of 25 July 2013 and includes the possibility of a public offer of CTT's shares). These measures are part of the memorandum of understanding signed by the Portuguese government with the troika.

Moreover, the implementation of the merger between ZON and Optimus and its impact on the market will also be worthy of attention.

The TMT sector in Portugal is expected to continue its sustained growth through the increased supply of different products and services. The new trend seems to be the development of the multiple-play sector, which includes offers for television, internet, fixed and mobile communications.

In what concerns investment in technology centres, it is important to underline PT's investment in one of the largest data centres in Europe, located in Covilhã, which will house and manage IT and cloud infrastructures and is expected to open in September 2013.

Finally, the approval of the new Competition Law and the effectiveness of long awaited reforms could result in a more competitive TMT market, with more innovation and greater benefits for consumers.

Appendix 1

ABOUT THE AUTHORS

JOANA TORRES EREIO

Uría Menéndez – Proença de Carvalho

Joana Torres Ereio joined Uría Menéndez as a trainee lawyer in September 2007 and became a senior associate in September 2012. Prior to joining Uría Menéndez, Ms Ereio completed a summer traineeship in another major Portuguese law firm and worked at the Portuguese Association for Consumer Protection. She focuses her practice on corporate law, mergers and acquisitions, private equity and restructurings, and also advises Portuguese and international companies on their day-to-day management. She also advises clients on personal data and IP/IT issues on a regular basis.

Ms Ereio has a postgraduate qualification in commercial law from the Universidade Católica and also completed an intensive course on corporate finance at the Universidade de Lisboa.

JOANA MOTA

Uría Menéndez – Proença de Carvalho

Joana Mota joined Uría Menéndez as a junior associate in February 2012. Between 2006 and 2009, she worked at another law firm and from 2009 to 2012 at a specialist IP law firm.

She focuses her practice on the acquisition, protection and maintenance of national and international IP rights and has represented parties in related litigation proceedings. Ms Mota has advised companies on the protection of personal data rights, copyright and related rights.

Ms Mota has a postgraduate qualification in IP law, which was taught by the Portuguese Association of Intellectual Property Law in conjunction with the Faculty of Law of the Universidade de Lisboa. She also has an advanced qualification in data protection law from the Universidade de Lisboa.

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Raquel Maurício joined Uría Menéndez as a trainee lawyer in September 2011. Prior to joining Uría Menéndez, she spent a summer traineeship at another major Portuguese law firm. Ms Maurício graduated in law from the Universidade Católica in Lisbon and recently completed the curricular part of the master's degree course in law and economics at the same university.

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