

The International Comparative Legal Guide to: Telecommunication Laws and Regulations 2010

A practical insight to cross-border Telecommunication Laws and Regulations



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1 Framework

1.1 When did Portugal first liberalise telecommunications networks and/or services?

The first liberalising telecom law was enacted in 1989, however it would take another decade for all market segments to become legally liberalised.

During this period a number of providers sprouted as the progressive privatisation of Portugal's main operator, Portugal Telecom ("PT"), led to the reduction of the State's weight in the telecommunications market by shifting public intervention from the holding of the incumbent to regulation.

1.2 Has Portugal fully implemented the EU 2003 regulatory framework? If Portugal has not fully implemented the new regulatory framework, have proceedings been brought against Portugal by the European Commission and if so, for which contraventions?

Yes. The current EU regulatory package was transposed into two acts, 2004 Communications Law and to the 2004 Electronic Communications Privacy Law. Nevertheless, despite delay in the transposition, Portugal initiated and completed the market assessment procedures far before the enactment of the new law.

1.3 Please give an overview of the different laws and regulations governing the operation of electronic communications networks and the provision of electronic communication services.

The cornerstone of the telecom legislation is the 2004 Communications Law, which contains provisions regarding general market framework, licensing, interconnection and all telecommunications networks and service provision. This act is seconded by a significant number of Government statutory instruments and regulations issued by the NRA (ANACOM).

Specific issues such as telecom privacy, radio-communications and mobile terrestrial network deployment are the subject of autonomous legislation.

The key statutes and regulations setting the current legal telecommunications framework are:

- (a) General framework: Law no. 5/2004, of 10 of February (the 2004 Communications Law).
- (b) Data privacy: Law no. 41/2004, of 18 of August (the 2004 Electronic Communications Privacy Act), and Law no.

67/98, of 26 of October (the 1998 Data Privacy Act).

- (c) Radiocommunications: Decree-Law no. 151-A/2000, of 20 July (the 2000 Radiocommunications Act), Decree-Law no. 11/2003, of 18 of January (2003 Radiocommunications Network Deployment Act), followed by a large number of statutory instruments and regulations.
- (d) Telecom services: Law no. 23/96, of 26 July (1996 Essential Public Services Law).
- (e) Telecom equipment and network deployment: Decree-Law no. 123/2009, of 21 of May.

1.4 Please describe the regulatory framework, in terms of regulatory authorities and associated agencies, e.g. national competition authority (where different).

Almost all aspects of the electronic communications markets are regulated by ANACOM, who also acts as enforcing agency for some specific issues.

According to its statutes, ANACOM is a public entity endowed with financial and administrative autonomy with the general purpose of regulating, supervising and representing the communication sector.

Although ANACOM's statutes were not modified by the 2004 Communications Law, some of its supervision powers and particularly its regulatory policy objectives were broadened along with the new harsher penalties for infringement of electronic communications laws.

Most of the regulatory and licensing powers are concentrated in ANACOM. However, other central and local administrative authorities have smaller but relevant roles.

Central Administrative agencies:

At the central Government, there is the Competition Authority ("AdC"), an agency empowered to enforce antitrust law who have a major role particularly on merger of telecommunications companies.

Also, at central administration level, the quality standards agency (Instituto Português da Qualidade), the Food and Economic Safety Authority (ASAE), the Data Protection Commission (CNPD) and the Consumer Directorate General have a relevant role especially in the approval and testing of telecommunications equipment and consumer related matters.

Local authorities:

With the liberalisation of the market and the emergence of the new players, municipalities also became much more active in their efforts to control the deployment of telecommunications networks both in public and private property.

1.5 Which principal aspects of electronic communications regulation fall under the supervision of the national regulatory authority for electronic communications?

Under the 2004 Communications Law, ANACOM's regulatory policy objectives may be summarised in two key objectives:

- (a) the promotion of effective competition on the provision of electronic communications network and service provision by guaranteeing the user benefit in terms of the provision of innovative, avoid market distortions and make rational the use of frequency allocation and numbering resources; and
- (b) consumer protection by ensuring access to the universal service, tariff transparency and protection against abusive legal terms and conditions imposed by operators and the protection of privacy.

The 2004 Communications Law also brought two very important innovations in respect of ANACOM's powers and duties:

- (a) a consultation and transparency mechanism referred to as "general consultation procedure", under which ANACOM will be required to hold public consultations as part of its regular decision making process; and
- (b) the power of administrative courts to review the merits of ANACOM's decisions on appeal. Until the 2004 Communications Law, appeal courts could only review decisions on legal and procedural grounds.

1.6 In order to be properly authorised to provide electronic communications networks and services, is a registration, declaration or notification required and if so to whom and for which purposes? What rules or conditions, if any, may be attached to a registration, declaration or notification?

Under the 2004 Communications Law there is a single licensing title, the General Authorisation.

Any undertaking intending to provide electronic communications services is required to notify ANACOM of the proposed activities upon which it may begin its commercial activity, unless these services are subject to individual right of use.

General Authorisations may be subject to certain conditions such as the obligation to:

- (a) provide interoperability of services and interconnections networks and grant access to end users of national numbering plan numbers;
- (b) maintain the integrity of public communications networks, including conditions to prevent electromagnetic interference between electronic communications networks and/or services;
- (c) comply with environmental and town and country planning requirements and with certain conditions for the use of radio frequencies, and human exposure of the public to electromagnetic fields caused by non-ionising radiation by electronic communications networks;
- (d) ensure personal data and privacy protection, despite the obligation to enable legal interception, and comply with consumer protection rules applicable to electronic communications, particularly restrictions related to the transmission of illegal or harmful content, in particular, in electronic commerce;
- (e) comply with the restrictions caused by major disasters in order to ensure communications between emergency services and authorities and broadcasts to the general public; and
- (f) pay administrative charges, both to the relevant central and local authorities, and contribute to the funding of the universal service.

1.7 Are any network operators or service providers subject to rules governing their operations over and above rules and conditions governing authorisations and imposing SMP obligations, for example under competition law?

Presently the PT Group is subject to special obligations as the universal service provider.

All other special obligations imposed on PT and other operators presently arise of the telecom regulatory framework.

1.8 Which (SMP) markets have been notified to the European Commission under Article 7 of the Framework Directive?

All notifications were served under the 2003 Recommendation. ANACOM identified 19 relevant markets and analysed all but one (access to mobile networks).

The most important notifications were:

- (a) fixed narrow band retail services (markets 1 to 6 and 19, the latter regarding access to non geographic numbering);
- (b) fixed narrow band wholesale services (markets 8 to 10);
- (c) wholesale broadband services (markets 11 and 12);
- (d) retail leased lines (market 7);
- (e) wholesale line rental (markets 13 and 14);
- (f) access, termination in mobile networks and international roaming (markets 15 to 17, only the 16th and 17th, respectively termination and roaming were analysed and subject to regulation); and
- (g) wholesale broadcast services (market 18).

It should be noted that the 2007 review did not produce any material changes, other than the reshuffling of names and the end of some exotic (but irrelevant) markets previously defined (notably market 19).

2 Licensing

2.1 If a licence or other authorisation is required to install or operate electronic communications networks or provide services over them, please briefly describe the process, timescales and costs.

Under the 2004 Communications Law the process is relatively simple. The applicant must submit a form to the regulator accompanied by a certificate of the registration issued by the competent Trade Register Office. In addition other information may be requested, particularly if the applicant intends to provide telecom services. In this case the applicant may be required to state:

- i) type(s) of network(s) those entities wish to establish, operate, control or make available;
- ii) description of the nature, characteristics and functioning of the network(s), including the purpose of the network, geographic coverage scope, technology to be used, network architecture, description of the information systems, indication whether the network is owned or belongs to another entity, whether the network installation requires the occupation of public domain or of private property, whether the network provision involves the use of radio spectrum or numbering facilities;
- iii) indication of the date set for the beginning of the network provision;
- iv) indication of the address of the entity and of the contact person for the purpose of notifications to be carried out by ANACOM, as well as of the responsible person in situations of disaster or within the scope of the National Emergency Plan; and
- v) indication of the shareholding composition at 1st and 2nd level.

There are several fees applicable depending on the type of licensing required. These fees apply to spectrum use, as well as number and specific network features that require specific licensing.

2.2 What other requirements, permits or approvals must be met or obtained before networks may be installed or operated and services provided?

Before the installation or the provision of the operator or the service, in some cases other permits may be required, e.g.:

- (a) the construction approval;
- (b) the urban planning approval; and
- (c) the environmental approval.

2.3 May licences or other authorisations be transferred and if so under what conditions?

In accordance with the article 37 of the Communications Law, the licence can be transferred. The owners have to inform the ANACOM of the transfer and his conditions. ANACOM has 45 days to authorise if it allows the transfer or not.

2.4 What is the usual or typical stated duration of licences or other authorisations?

General authorisations do not have a stated duration; only rights of use are granted for limited, usually an initial 15-year term, which may be extended up to 20 years. Thereafter, such rights are renewable for successive 15-year terms upon request by the licensee a year before term of the licence.

3 Public and Private Works

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

Yes. The Decree-Law no. 68/2005, of 15 March, enable providers of electronic communications networks to construct infrastructure on public land and the Decree-Law n.º 59/2000, of 19 April, creates an obligation on all public entities that administer part of the public domain to define and publish access conditions for operators.

3.2 Is there a specific planning or zoning regime that applies to the installation of telecommunications infrastructure?

It depends mostly on the municipalities, except for mobile terrestrial aeriels which have a specific licensing regime. Nevertheless, there is a general rule encouraging operators to co-locate and share network facilities.

3.3 Are there any rules requiring established operators to share their infrastructure, e.g. masts, sites, ducts or cables (i.e. dark fibre)? Are there any proposals to mandate 'passive access' to such basic infrastructure?

There is a general principle network sharing principle under the 2004 Communications Law.

Also, as part of the SMP assessment process ANACOM identified certain infrastructures (ducts) owned by PT Group as being subject

to regulation and therefore establishing a reference offer. Moreover, recent regulations intending to generally facilitate the deployment of networks, but particularly NGN's, imposed the adoption of new regulation aiming at the elimination of vertical barriers to the roll out of networks (specifically FTTH access).

4 Access and Interconnection

4.1 Is network-to-network interconnection and access mandated, and what are the criteria for qualifying for the benefits of interconnection?

The 2004 Communications Law establishes a general interconnection obligation as part of the rights granted by the general authorisations. In addition, ANACOM may impose specific access and interconnection obligations on all operators whenever it believes to be suitable to promote competition and protect the customer, including the possibility to impose technical and operational interconnection requirements.

4.2 How are interconnection or access disputes resolved? Does the national regulatory authority have jurisdiction to adjudicate and impose a legally binding solution?

Yes, pursuant to the 2004 Communications Law, disputes between different communications providers concerning network access and the relevant terms and conditions for such access may be referred for extra-judicial resolution to ANACOM.

4.3 Are any operators required to publish their standard interconnection contracts and/or prices?

Yes. At present the incumbent PT Comunicações (fixed) in both origination and termination markets and all operators (although differently) in termination markets are subject to interconnection price caps.

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

Yes. Especially since 2008, Anacom has imposed several remedies, notably on mobile termination rates. Moreover, it has shown resistance to reducing the regulatory burden on PT's fixed undertakings.

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

Only PT's fixed line operator has specific cost accounting requirements to fulfil, an obligation imposed under the 1997 regulatory framework. This obligation, however, should not be confused with any other remedy such as accounting, functional or legal separation (e.g. on wholesale).

4.6 How are existing interconnection and access regulatory conditions to be applied to next generation (IP-based) networks?

Yes. The first regulations date back to 2006 and referred to flat rate IP interconnection, however, in 2009, NGN's have become a major telecom policy priority. In order to allow for their deployment the

Government enacted new statutes aimed at simplifying licensing procedures and, to a smaller extent, incentive operators to roll out their networks.

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

Only PT Comunicações is subject to such obligations. There is an extensively regulated local loop unbundling reference offer (ORALL).

- 4.8 Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed?**

Yes. As referred to in question 4.6 the Government published legislation aimed at facilitating the rollout of NGN. These incentives consisted of: (i) defining a principle of equal access to ducts and poles on public domain; (ii) redefining the access principles of access to ducts on privately owned property; and (iii) offering of credit lines specifically for NGN deployment.

5 Price and Consumer Regulation

- 5.1 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?**

As referred above, only wholesale price controls apply, except where international roaming services is concerned.

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

Yes, communication services are subject to several special rules on contract terms and information availability.

6 Numbering

- 6.1 How are telephone numbers and network identifying codes allocated and by whom?**

Telephone number and network identifying codes are allocated by ANACOM.

Each operator or service provider has a determinate prefix number which is given by ANACOM following the National Numbering Plan ("PNN").

- 6.2 Are there any special rules which govern the use of telephone numbers?**

Yes, the principles of the PNN define the usage for each numbering range.

- 6.3 How are telephone numbers made available for network use and how are such numbers activated for use by customers?**

All numbers, including signalling codes, are granted upon request

by ANACOM. All numbers are granted to operators and service providers who then pass them to users.

- 6.4 What are the basic rules applicable to the 'porting' (i.e. transfer) of telephone numbers (fixed and mobile).**

Since 2001 all fixed geographic numbers are subject to portability, this obligation was extended in 2002 to mobile services.

Number portability is always requested by users to the receiving operator who then will process the request through the number portability entity and the other operators.

7 Submarine Cables

- 7.1 What are the main rules governing the bringing into Portugal's territorial waters, and the landing, of submarine cables? Are there any special authorisations required or fees to be paid with respect to submarine cables?**

There are no specific rules governing the bringing of submarine cables.

8 Radio Frequency Spectrum

- 8.1 Is the use of radio frequency spectrum specifically regulated and if so, by which authority?**

Yes. The management of the radio electric spectrum is a specific task of ANACOM under the 2004 Communications Law. It is ANACOM's duty to allocate these frequencies according to the criteria of:

- availability;
- guarantee of effective competition in the relevant market; and
- effective and efficient use of the frequencies.

- 8.2 How is the use of radio frequency spectrum authorised in Portugal? What procedures are used to allocated spectrum between candidates - i.e. spectrum auctions, comparative 'beauty parades', etc.?**

As far as special use of specific spectrum licenses is concerned, for uses such as GSM, UMTS, TDT, ANACOM's tradition is to award spectrum licenses through large and high profile "beauty parades".

However, for other used, e.g. microwave and satellite links ANACOM uses single or radio network licensing procedures under the Radiocommunications Law. These licenses are much simpler and follow a "first in first served" principle.

- 8.3 Are distinctions made between mobile, fixed and satellite usage in the grant of spectrum rights?**

The National Board of Frequency Allocation ("NBFA") specifies the access to spectrum rights.

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

Satellite earth stations have no specific requirement as ANACOM enforces ITU-R regulations regarding Earth stations. However, prior to the deployment of a specific service (e.g. a specific VSAT

service), even using international allocated frequencies, it is advisable to consult ANACOM to ensure that frequencies conform to the NBFA.

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

Under 2000 Radiocommunications Law, ANACOM has several regulatory powers in addition to the already granted by the 2004 Communications law, namely, the granting of permanent or temporary radio licenses, exemption from licensing of certain classes of services and stations (certain classes of stations or networks, such as VSAT stations, SRD-Short Range Devices, cordless telephones - analogical or digital - portable and satellite stations and mobile satellite terminals).

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

The licence or authorisation for the use of radio frequency are submitted to fees (article 32 n.º 1 al. f) and 105 of the Communications Law). These fees are established by the Government.

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

The spectrum licences are able to be traded (article 32(1)(e) and article 37 of the 2004 Communications Law).

The owner of the spectrum licences have to inform ANACOM of the transfer and respect the transfer's conditions. To date these procedures have seldom been used.

9 Data Retention and Interception

9.1 Are operators obliged to retain any call data? If so who is obliged to retain what and for how long? Are there are data protection (privacy rules) applicable specifically to telecommunications?

Yes. According to the Data Retention Directive, transposed in 2008, operators are required to retain call data provided for a one-year-period from the date of the communication.

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

Yes. Undertakings providing publicly available electronic communications networks and services may be subject in the exercise of their activity to the provision of systems of legal interception to competent national authorities, as well as the supply of means of decryption or decoding.

9.3 What is the process for authorities obtaining access to retained call data and/or intercepting calls? Who can obtain access and what controls are in place?

Legal interception has to be determined by a criminal court order, other than that is deemed a criminal offense. The authorisation must be requested by the public prosecutor or by the criminal police.

10 The Internet

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

No, the services over the internet are regulated by the 2004 Communications Law, except in respect of content.

10.2 Is there any immunity (e.g. 'mere conduit' or 'common carrier') defence available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Yes. Under existing regulations operators are deemed mere intermediaries in the transmission of information, and therefore are not liable for content.

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

No. Under telecom regulations operators are not under any specific obligation to act against customers that may be using their networks for unlawful activities.

However, under the general law, there may be cases where a specific and lawful knowledge of an obviously illegal activity or content is should prompt an operator to have an active role in removing or disabling access to such content.

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

No. There is no obligation to remove the disputed contents or to disable access to the information on the grounds of a claim made by an interested party, where the illegality is not obvious.

10.5 How are 'voice over IP' services regulated?

VOIP services are regulated at two levels: (i) wholesale, with a special framework under the RIO (reference interconnection offer); and (ii) as an access service through the allocation of a specific numbering range for "nomad" services.

10.6 Are there any rules to prevent, restrict or otherwise govern internet or email communications, in particular, marketing and advertising communications?

Decree-Law 7/2004 establishes the rules for Internet or email communications. The unsolicited marketing communications through automatic calling devices email without the consent are prohibited.

11 USO

11.1 Is there a concept of universal service obligation; if so how is this defined, regulated and funded?

There is a concept of universal service obligation. The universal service obligation is defined as a minimum set of services that should be made available to all users for an affordable price and independently of their location.

The USO is regulated by ANACOM and defined by the 2004 Communication Law.

With the right to expand the definition of universal service to accommodate new market needs, ANACOM may also use retail price controls as a tool to ensure the provision of universal services.

This means that ANACOM may decide to require providers to make available to the public low price service packages, lower the upper limit of certain service tariffs, or to apply uniform tariffs in the whole national territory.

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He served as a Member of the Board of Directors of Univertel (now a subsidiary of Spanish cable operator Cableuropa SA) between 1999-2001.

12 Foreign Ownership Rules

12.1 Are there any rules restricting direct or indirect foreign ownership interests in electronic communications companies whether in fixed, mobile, satellite or other wireless operations?

No. There are no rules restricting direct or indirect foreign ownership interests in electronic communications companies.

13 Future Plans

13.1 Are there any imminent and significant changes to the legal and regulatory regime for electronic communications?

With the adoption of the new directives arising of the 2007 review, changes are expected. However there is a consensus that changes should address specific issues and whilst maintaining current major guidelines.

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- Competition issues
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- Internet Content agreements
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