

The Liberalisation of the Portuguese
Telecommunications Market

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I. Introduction

Portugal is attracting increased attention for telecommunications operators. For investors, Portugal offers an appealing combination: it is an industrialized society with well-established law, sophisticated financiers and a stable currency within the Euro countries; at the same time, it still has high demands for improved telecommunications and infrastructure. Significant opportunities exist for developers, particularly those in the telecommunications sector.

Understanding the legal environment in which telecommunication projects are developed, financed, constructed and operated in Portugal is critical to an accurate assessment of the potential for a proposed project. The following is a general discussion of selected Portuguese laws relevant to the operation telecommunications networks and provision of services. However, the information and expressions of opinion this document contains are not intended to be a comprehensive study and should not be treated as a substitute for specific advice concerning individual situations.

II. Background

The Portuguese government has been implementing a progressive liberalisation programme of the Portuguese telecommunications market, under the policy set by the European Union ("EU") regarding the establishment of an internal market for telecommunication services.

Simultaneously, it is privatising Portugal Telecom, which is the Public Incumbent under a concession agreement, entered upon on Decree-Law 40/95 of February 15, 1995 (the "Concession Agreement"). The company is currently 10% owned by the government. The Public Incumbent will remain the only company licensed to provide fixed telephony services until the year 2000.

Under the Concession Agreement, Portugal Telecom also uses the so-called basic infrastructure for the provision of other telecommunication services, such as data transmission and cable television, which has enabled it to build a stable customer base before any other competitor.

The privatisation process has strongly influenced the legislative decisions of the Portuguese government, which has maintained Portugal Telecom's privileged status.

The enactment of the new Telecommunications Law and of the new Economic Sectors Law in August of 1997 changed the situation by clearly allowing the building and operation of public telecommunication systems by private entities.

Both the Telecommunications Law and the Economic Sectors Law came, to some extent, as a sequel of the European Commission (the "Commission") decision 97/310/CE (the "EC Decision"), which determined that Portugal had not implemented the European Union directives regarding the full liberalisation of the telecommunications market.

The EC Decision reviewed Portugal Telecom's market position and the state of liberalisation at that time and concluded that the Portuguese telecommunications market lacked competition. Therefore, the Commission decided not to postpone the implementation of EC Directive 90/388/EEC, with respect to:

- the establishment of privately owned infrastructure;
- the use of infrastructures provided by third parties; and
- the sharing of infrastructure, other facilities and sites (Article 2 of the EC Decision).

On the other hand, the Commission decided that Portugal was allowed to "*.... postpone until 1 January 1999 the lifting of restrictions on the direct interconnection of mobile telecommunications networks with foreign networks. It must notify to the Commission before that date the legislative measures adopted in order to implement Article 3 (d) of Directive 90/388/EEC.*" (Article 1 of the EC Decision).

Last, Portugal was granted a transitional period for the revocation of Portugal Telecom's voice-telephony monopoly and the lifting of the restrictions to the establishment of public telecommunications networks, in accordance with the timetable laid down in Article 3 of the EC Decision.

III. The 1997 telecommunications law

Law 91/97 of 1 August 1997 (the "Telecommunications Law") sets the conditions and legal terms for the establishment, management and operation of telecommunication networks as well as the provision of telecommunication services.

The liberalisation of the telecommunications market is laid out in article 7 of the Telecommunications Law, following the opening of the telecommunications sector to private companies operated by Law 88-A/97 of 25 July 1997 (the "Economic Sectors Law").

The Telecommunications Law introduced the following guidelines:

- liberalisation of the provision of telecommunications services, except for the provision of fixed telephony services, which shall remain the monopoly of the public incumbent until 1 January 2000;
- allow the construction and operation of telecommunications networks by private operators;
- establishment of the obligation on the incumbent to operate its network as an open network; and
- ensure access to public telecommunications networks, managed by the incumbent or by the new entrants, to all telecommunications operators.

The Telecommunications Law has also eliminated the restrictions to the participation of foreign companies in the Portuguese telecommunications market.

IV. The main regulatory framework

The Telecommunications Law sets the basis for the regulation of the Portuguese telecommunications market. Several Decree-Laws have been enacted to develop its general provisions.

The following are the main statutes governing the Portuguese telecommunications market:

- Decree-Law 474/99 of November 8, 1999, which approved the fixed telephony service regulation (the “Fixed Telephony Services Law”);
- Decree-Law 290-A/99 of July 30, 1999, which sets the conditions of management of public telecommunications networks for purposes of offering of an open network and of leased circuits (“the Public Telecommunications Networks Law”);
- Decree-Law 290-B/99 of July 30, 1999, which approved the public telecommunications service regulation applicable to the providers of data transmission services (the “Public Telecommunications Services Law”);
- Decree-Law 290-C/99 of July 30, 1999, which rules on the establishment and use of private telecommunications networks (the “Private Telecommunications Networks Law”);

- Decree-Law 415/98 of December 31, 1998, which rules on the interconnection between private operators through the basic telecommunications infrastructure (the “Interconnection Law”);
- Decree-Law 381-A/97 of December 30, 1997 (“Decree-Law 381-A/97”) which sets the rules in respect of the operation of public telecommunications networks and the provision of public use telecommunications ⁽¹⁾;
- Decree-Law 249/97 of September 23, 1997, which sets the main rules regarding the installation of television and broadcasting reception and distribution systems for private use in buildings;
- Decree-Law 241/97, of September 18, 1997, which replaced Decree-Law 292/91, of 13 August 1991 (the “Cable Television Law”), and approved the new set rules regarding the operation of cable television network ⁽²⁾;
- Ministerial Decision 477/96 of September 10, 1996. This decision liberalises Portuguese fixed telephony services provided to Closed Users Groups (*Grupos Fechado de Utilizadores* – “GFU”) allowing private companies to operate a voice telephony limited network service (*Serviço de Redes Privativas de Voz* – “SRPV”) providing fixed telephony to GFUs. For that purpose the SRPV operators shall apply for a special regional or national license to be granted by the National Regulatory Authority (*Instituto das Comunicações de Portugal* – “ICP”). SRPV operators are bound to lease from the Public Incumbent its public basic network infrastructure for the provision of a voice telephony limited network service, when for the provision of such services is required the use of the basic network infrastructure, which is managed by the Public Incumbent. In such case the Public Incumbent shall be compensated in accordance with article 5 of the ministerial decision and article 25 of Decree-Law 40/95;

⁽¹⁾ This Decree-Law implemented the directive 96/2/CE (amended the directive 90/388/CE regarding mobile telecommunications), the directive 96/19/CE (amended the same directive 90/388/CE on the implementation of full competition in telecommunications markets) and the directive 97/13/CE (regarding a common framework for general authorisations and individual licences for telecommunications services) and revoked Decree-Law 346/90, of November 3, 1990 (complementary services), Decree-Law 147/91 of April 12, 1991 and Decree-Law 329/90 of October 23, 1990 (value added services).

⁽²⁾ This Decree-Law implemented the directive 95/47/CE on the transmission of television signals and allows cable television networks to support radio and television transmissions. It also allows the provision of telecommunications services such as interactive services and bi-directional connections for data transmission and the lease of the cable network for the provision of other telecommunications services.

- Ministerial Decision 240/91, of 23 March 1991 laid down the conditions for the granting of a license to provide mobile communication services ⁽³⁾; and
- Decree-Law no. 283/89 of 23 August 1989, as amended by Decree-Law 379/90 of 7 September 1990, Decree-Law 165/92 of 5 August 92, Decree-Law 95/96 of 17 June 1996 and Decree-Law 100/98 of 21 April 1998 (“Statute of the National Communications Institute”).

V. The legal definition of telecommunication services

Article 2 of the Telecommunications Law defines “telecommunications” as the transmission or reception of signals representing symbols, writing, images, sound or any other information by wire, by optical means, by radio frequencies, or by other electromagnetic means.

The Telecommunications Law distinguishes “public telecommunications” services and “private telecommunication” services. Public telecommunication services are addressed to the public in general, while “private telecommunication services” are addressed to a restricted number of users.

The law also distinguishes “public networks”, that are used for the provision of public telecommunication services by the network operators or by other service providers when operated as an open network, and “private networks”, which serve the needs of a single corporation or a restricted number of users. For instance, Virtual Private Networks (“VPN”) are considered private networks.

These distinctions aim to separate the ownership of infrastructures that serve the public in general from those that may serve the communication needs of companies and individuals. A practical consequence of the distinction is that private networks cannot be used to resell telecommunication services.

VI. Universal service obligations and open network

Under Article 8 of the Telecommunications Law, the State has the obligation to provide universal telecommunications service. The “public network” that supports the provision of such services is the so-called “basic telecommunications infrastructure” (article 12/1 of the Telecommunications Law) which was built by the former stat-owned telephone companies.

⁽³⁾ Recently amended by Ministerial Decision 443-A/97 of July 4, 1997.

According to section 2 of article 8, fixed telephony services shall be provided by the State, a public entity or a private entity under a concession agreement. Such agreement may also include the development and operation of the “basic infrastructure” and the provision of certain telecommunication services, *e.g.* the lease of circuits and data transmission (article 18/3 of the Telecommunications Law). For the provision of such services Portugal Telecom is receives a fee (article 25 of Decree-Law 40/95).

Regarding the basic telecommunications infrastructure, article 12/4 of the Telecommunications Law states that the basic telecommunications infrastructure is an “open network”. In other words, private operators may access to such infrastructure under the exact same conditions as the public incumbent and its subsidiaries.

The basic telecommunications infrastructure will ensure the interconnection between the different networks in accordance with article 15/1 of the Telecommunications Law and article 1 of the Interconnection Law.

Pursuant to article 6/1 of the Interconnection Law, the owners of telecommunications networks with significant market power are obliged to provide interconnection to other telecommunication service providers.

Specifically, Portugal Telecom, which is the public incumbent, and other telecommunications operators deemed to have significant market power are obligated to offer interconnection at cost-oriented prices to other telecommunication service providers that request such service and not to impose discriminatory prices in relation to their own subsidiaries or business units.

They are also required to have separate accounts for the interconnection costs and revenues and to ensure the confidentiality of the information received from the telecommunications service providers.

VII. The construction and operation of telecommunication networks

Article 11 of the Telecommunications Law states that public networks may be built, managed and operated by licensed telecommunication operators. Restrictions may only be imposed due to technical aspects or security reasons.

In general, the provision of telecommunication services is now open to private operators, who must register before the ICP (article 4/1 Decree-Law 381-A/97). Operators are required to obtain licenses from the ICP for:

- the provision fixed telephony;

- the construction of public networks;
- the use of radio frequencies for the establishment of networks or the provision of services; and
- the provision of universal telecommunication services.

Other telecommunication service providers, such as the Internet service providers or the providers of fixed telephony services to closed user groups, are only required to register before the ICP.

Articles 6 to 25 of Decree-Law 381-A/97 provide on the registration and licensing procedures. Among other legal requirements stated in article 12, candidates must prove to have both technical and financial capability to develop the project described in the application (article 13 of Decree-Law 381-A/97).

Licences are granted for a 15-year period, subject to renewal for identical periods on request filed by the licensed operator (article 11/2 of Decree-Law 381-A/97).

VIII. Conclusions

Portugal is attracting increased attention for investors in new telecommunication projects. There are many features of the Portuguese legal landscape that will be unfamiliar to an investor accustomed to project financings in the US or UK. However, Portugal offers a legal landscape that is closer to European standards, a stable currency, within the Euro zone, and a growing demand for telecommunications infrastructure. The opportunities in the telecommunications markets in Portugal today are more exciting than ever.

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