



PORTUGUESE TELECOMS

Market and legal overview | October 2017



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Foreword

This paper aims to provide an overview of the Portuguese Telecoms Market and its regulatory framework.

The sector's revenues experienced a slight (-0,3%) decrease in 2016, as a result of an eight year recession period. Nevertheless, in 1Q2017, major operators reported a YoY revenue growth rates between 1,2% to 3,5%.

These figures show a trend for future stabilization in the market, in spite of the ongoing restructuring of the former incumbent and the uncertainty surrounding the appointment of the telecoms regulator's new board.

Undeterred by the loss of almost one quarter of its revenues due to the financial crisis, the Portuguese communication's market remains one of Europe's most interesting in terms of new services and solutions.

As available data shows, liberalisation of the telecoms market had a vastly positive impact both in the sector, and in the economy, as Portugal is fairing particularly well in comparison with its European Union counterparts in almost all of the market segments.

A more detailed analysis shows that the Portuguese market for traditional services – i.e. fixed and mobile voice and data – is highly concentrated, as Portugal's three major operators, Altice, NOS and Vodafone, hold nearly 95% of the market shares.

As result of such an extremely high concentration rate, new competitors are not expected to appear in the traditional sectors.

On the other hand, OTT providers are becoming an increasing threat to traditional operators, due to their very popular services which include instant messaging, live video, audio calls and video on demand.

Notwithstanding the telecoms market apparent hostility towards new entrants and its premature signs of recovery, new players, such as Altice, have still managed to successfully establish themselves as prominent players.

Moreover, Portugal has a widespread infrastructure and a large customer base, open to advanced and complex communication products and services, thus, creating interesting opportunities in this field.

Market Statistics

At the end of 1Q2017, there were around 3.42 million Internet accesses at a fixed location, an increase of 6.7% over the previous twelve months.

In 1Q2017, fibre optic (FTTH/B) became the main form of Internet access in fixed broadband as exceeded cable modem (34% and 33.2% of accesses, respectively). Optical fibre (FTTH/FTTB) grew 30.9% since 1Q2016. These technologies had a growth rate of more than 50.000 new accesses per quarter since 2015.

Nowadays there are 6.5 million users of mobile broadband Internet, a 17.3% increase when compared to 1Q2016. At 1Q 2017, the mobile services reached 26.4% and fixed services 4.1%. 87% of families use triple, quadruple and fifth play bundles.

Communication prices have been increasing above inflation rate. As a result, revenues from bundled services increased 6% when compared to 1Q2016. However, the average monthly revenue per subscriber decreased 1.6% in the same period.

Operators relied in bundled services to combat decreasing revenues, lock-in costumers and create hurdles for new entrants. The legal and economic implications of offering strong incentives for consumers to choose a bundle of fixed/mobile, voice/data and hundreds of TV channels are as easy to understand as difficult to address.

To enter the Portuguese residential market, operators need to offer onset complex services, each one requiring specific regulatory requirements and arrangements with operators. Bundled services means that barriers extend from requirement of licenses for certain segments to the need of compliance with consumer protection regulations. In addition, any new entrant will be faced with difficult negotiations to implement commercial agreements with established and aggressive incumbents.

Despite being a relatively closed market for the provision of traditional services (PSTN), the over-the-top (OTT) Internet-based service market is a viable route for new entrants. In 2016, the use of OTT services was less 4% than EU average.

Most users view OTT as a way to socialize and to access free content. Only 30% users consider that there is a complete substitution between OTT and PSTN. The apparent lack of interest in free calls and messaging services through OTT is at least partially explained by the existence of two factors: (i) the use of residential bundles and (ii) the widespread use of Tribal Packages for some classes of services.

OTT services have a very light regulatory framework when compared to their competitors. It is safe to say that is a clear growth opportunity for new entrants interested in establishing an operation in Portugal.

Market Players

PT, now **ALTICE**, is the former incumbent. The company provides fixed and mobile broadband services, fixed and mobile voice services, subscription TV service, VoD, cloud services, cloud gaming services and wireless internet hotspots.

NOS resulted of the merger of ZON and Optimus in 2014. The company provides services in all markets, including fixed and mobile broadband services, fixed and mobile voice services, subscription TV service, VoD, cloud and it operates movie theatres.

Vodafone Portugal was incorporated as Telecel in 1992, now a full subsidiary of the Vodafone Group. Provides fixed and mobile broadband services, fixed and mobile voice services, subscription TV service, VoD and Cloud services.

Having entered the market in 1993, **NOWO** (formerly Cabovisão) provides services in central and southern Portugal, including fixed voice and broadband services and subscription TV service. The company was held by Altice between 2011 and 2015 and is now fully held by the APAX Group.

Onitelecom was incorporated in 2000 under the brand name ONI. Acquired by Altice in 2013 and sold in 2015 to the APAX Group, ONI is focused in fixed internet and telephone and multiple cloud services to the business sector and to public entities.

AR Telecom operates since 2000 and provides solutions to professionals and to the public sector, including broadband, voice and multiple cloud services.

IP Telecom, previously Refer Telecom, specializes in management services in connection with the Portuguese highway and railway infrastructure.

Orange Business Portugal is a subsidiary of Orange Business Services. It provides mainly integrated communications solutions and services to global enterprises in cloud computing, unified communications.

COLT Technology Services is a subsidiary of Colt Group. It supplies network, voice, IT services and datacenter.

G9Telecom provides fixed broadband, fixed voice and mobile voice services to business clients.

Mobile virtual network operators ("MVNO") have not been a success in Portugal. Still operating we have: **Phone IX** held by CTT-Correios de Portugal S.A., **Lycamobile** and **Vectone Mobile** (formerly Mundoio). These two companies are in Portugal since 2012; and provide low prices for international calls to immigrant communities.

Legal framework

The main **electronic communications** statute is Law no. 5/2004, of 10 February 2004 (the "2004 Communications Law"), which transposed the 2002 European Union ("EU") Access, Authorisation, Framework and Universal Service Directives, as well as the Directive on Competition in EC market to national law.

The 2004 Communications Law revoked all previous regulations containing provisions related to general market framework, licensing, interconnection and all telecommunications networks and service provision, with the exception of radio communications, telecommunications infrastructure and supply of electronic equipment. Key statutes and regulations are listed in Schedule I hereto.

In addition to national law, EU norms also have a direct impact in the Portuguese EC sector, such as Regulation (EU) no. 531/2012, of 13 June 2012, and more recently the Regulation no. 2015/2015, of 25th November, which approved the end of roaming charges within EU space by 15 July 2017.

The 2001 Radio Communications Law provisions apply to the licensing and deployment of **radio communications** networks and stations, and above all to the general conditions on the use of the radio spectrum, exposure to electromagnetic radiation and the sharing of radio communication infrastructures.

Under the 2001 Radio Communications Law, ANACOM has several regulatory powers in addition to those already granted by the 2004 Communications law (see above), namely, the awarding of permanent or temporary radio licenses and the definition of certain classes of services and stations that may either require or be exempted from licensing procedures.

Wireless services may be divided and regulated into three main categories:

- Terrestrial mobile services such as cellular telephony (e.g. GSM/UMTS operators) and trunking, which are regulated by the 2004 Communications Law;
- Fixed wireless services such as FWA and wireless leased lines using microwave links, which are not considered telecommunications services per se, but are included in other classes of services such as fixed telephone services (for FWA) and leased line services; and
- Satellite services that are subject to radio electric licensing.

In 2010, ANACOM published a relevant number of consultations on wireless issues, including the harmonization of licensing titles of mobile network operators ("MNO").

ANACOM – the Portuguese NRA

Incorporated in 1981, ANACOM only initiated its activity with the early steps of the market liberalization in 1989. Its statutes were revised in 2015 to grant more independence from the government and, particularly, financial independence. According to its statutes, ANACOM has three main roles:

- Market regulator. ANACOM should guarantee a levelled playing field for all market operators and handles spectrum and numbering allocation, licensing and fees, as well as coordinate civil, military and law enforcement communications;
- Market supervisor. It is entrusted with the powers to enforce sector specific legislation and compliance with licensing terms; and finally,
- State's representative. ANACOM represents the Portuguese State at international bodies, as well as in several other entities in areas as diverse as applied scientific research, technical standardisation and civil emergency communications.

ANACOM is managed by a board of three or five directors appointed by the Government and confirmed in Parliamentary hearings, for a six years non-renewable term. ANACOM Directors are irremovable, with very limited exceptions. Once their term is over, they are barred to serve as managers in any company of the sector.

The supervisory and regulatory powers under the Communications Law were revised in 2009 and in 2012. ANACOM has now a wide range of tools: i) definition of strategic guidelines and general policies; ii) preparation of regulations; iii) allocation of spectrum and numbering resources; iv) coordination with competition authorities; v) equipment certification; vi) dispute resolution between operators; vii) broad powers of investigation; viii) use of precautionary and/or interim measures such as injunctive relief; ix) apply fines from € 45,000 to € 5 M; x) confiscation of equipment; and xi) suspension for up to two years or even cancellation of authorisation.

ANACOM tends to apply other enforcement actions rather than fines. The Competition, Regulation and Supervision Court hears appeals against penalties imposed by ANACOM.

The 2004 Communications Law also contains transparency procedures, including:

- The "general consultation procedure", under which ANACOM is required to hold public consultations as part of its regular decision-making process; and
- The power of administrative courts to review the merits of ANACOM's decisions on appeal.

Other administrative agencies

Although most regulatory powers are concentrated in ANACOM, which acts as a “one stop shop” concentrating most of the regulatory and licensing powers, other central and local administrative authorities have smaller but relevant roles.

Adc - The Portuguese Competition Authority (“AdC”), who has a major role on merger controls regarding electronic communications companies, has a key role to consider.

Since its incorporation (January 2003), AdC cleared several mergers and acquisitions (“M&A”) between electronic communications operators, such as: (i) Vodafone and OniWay concerning the mobile market; (ii) Novis Telecom and KPNQwest Portugal in the fixed voice and data market; (iii) Riverside and Onitelecom regarding the fixed market; and (iv) Sonaecom (Optimus) and PT Group concerning all markets (despite the approval of AdC, this merger would ultimately fail). More recently, AdC cleared the M&A operations between (v) Altice Group and Cabovisão; (vi) Optimus and ZON Multimedia – this merger created “NOS”; and (vii) Altice Group and Winreason (Onitelecom).

Other than AdC, the **European Commission** has competence to control concentrations having European dimension, e.g. acquisition of PT by the Altice Group in 2015.

IPQ - Portuguese Quality Institute (Instituto Português da Qualidade), the Customs Office (Alfândegas); and the Food Safety and Economic Activities Authority (Agência da Segurança Alimentar e Económica) have a relevant role especially in the approval and testing of electronic communications equipment.

Municipalities – Municipalities have had a relevant influence in the electronic communications sector over the years. These entities became much more active in their efforts to control the deployment of communications networks both in public and private property with the liberalisation of the market and the entrance of new players. Although all network operators were affected by the municipalities' intervention, wireless services faced difficulties in their network roll out.

The right to use public ways is generically addressed by the 2004 Communications Law, Decree Law No.11/2003 of 18 January 2003 and ANACOM Regulation No.38/2004 of 29 September 2004. All municipalities, as well as other entities with territorial jurisdiction over public ways, such as port and airport authorities, are required to regulate in a public, swift, transparent and non-discriminatory terms the right of public electronic communications network operators to use public ways under their management.

Licensing procedures

In line with the Authorisations Directive, the 2004 Communications Law replaced the existing registration and licensing procedure for a single general authorisation: a clear guarantee of freedom in the provision of electronic communications networks and services, subject only to compliance with the general authorisation regime.

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. Undertakings must also communicate the termination of those services within at least 15 days.

Under the general authorization, undertakings are allowed to:

- Deploy their own networks and service facilities, using, if necessary, administrative privileges such as the right to expropriate land and create rights of way;
- Negotiate interconnection or obtain access to other providers services; and
- Subject to public tender procedures and/or ANACOM decision, act as universal service providers for certain services, or provide certain coverage obligations.

Co-location and facility sharing between undertakings is encouraged and in certain cases may be imposed by ANACOM.

The concessionaire of the public telecommunications service has a specific obligation to make available to other providers access to ducts, poles and other owned or managed infrastructure for the purpose of installing their own systems, equipment and other resources. The right to operate under a general authorisation is not subject to term.

Although, there are differences in the authorisations of individual rights. For example, the individual rights of use of spectrum and similar rights are granted for limited periods.

These time periods may vary between 10 and 20 years, depending on the service, the purpose and the need to allow an adequate period to recoup the investment.

These rights are renewable for successive periods upon request by the licensee a year before the expiration of the license. However, ANACOM may oppose the renewal by issuing a substantiated decision following a consultation on the matter. In case of absence of a decision, the renewal is deemed granted.

Market regulation

ANACOM may apply ex-ante remedies to operators with SMP. New market definition procedures were the core of the changes brought by the EU regulatory package to the Member States' legislation (e.g. 2004 Communications Law). In earlier sector regulations, the definition of relevant markets and the determination of the market shares were included in specific provisions.

Market analysis undertaken after the 2007 review of the EU's Market Definition Recommendation were expected to give rise to significant changes. However, the analysis carried out by ANACOM did not reflect any major impact.

In 2014, ANACOM revoked the obligations imposed to operators in the retail markets of access to the public telephone network and maintained the obligations of operators in the wholesale market of call origination, both at a fixed location.

Access and Interconnection. The legislation establishes the freedom of negotiation of interconnection agreements between all undertakings, notwithstanding ANACOM's intervention powers. The property of the traffic remains in the originating network. However, operators may agree on a different ownership model in the relevant interconnection agreement and are free to decide on the routing and termination of calls.

International carriers' access or interconnection do not need to apply for a general authorisation provided that they do not offer any electronic communications services in Portugal. ANACOM may impose access and interconnection obligations on all operators whenever it believes that promotes competition and protect the customers.

Obligations imposed to operators with SMP. The following obligations are imposed to operators with SMP: i) Provision of different reference offers; ii) Transparent billing, accounting separation and, in some cases, non-discrimination; iii) Price control mechanisms; iv) Granting access to specific network elements; and v) Vertically integrated companies should place activities related to the wholesale provision of relevant access products to an independently business entity.

ANACOM has employed price control mechanisms throughout the years in wholesale markets (e.g. price drop in the wholesale call termination market is now at 0,0083 euro per minute).

ANACOM has a special prerogative to impose price controls and special obligations over retail markets, including a minimum set of leased line services and carrier pre selection. ANACOM has stated that the imposition of regulatory obligations is primarily targeted at wholesale markets to avoid unwelcome disruption on retail services.

Universal service

The universal service is defined as a minimum set of services that should be made available to all users at an affordable price and regardless of their location. Universal service is an “evolving” concept in evolution as result of technology changes and consumer's demand for new services. Interventions of the regulator will have to consider balancing the need to minimise market distortions and the public interest. The universal service obligation entails one or more of the following:

- Access to public fixed telephony services, including public payphones;
- Directory services;
- Special measures aimed at guaranteeing access to handicapped citizens; and
- Quality of service levels.

Together 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, to lower the upper limit of certain service tariffs, or to apply uniform tariffs in the whole national territory.

Fixed telephony providers are also required to make available to consumers:

- Detailed invoicing, fully relating, whenever applicable, the: (i) activation charges; (ii) monthly subscription fees; (iii) cost per class of service; (iv) equipment rental fees; (v) other subscribers' debits; and (vi) compensation resulting from reimbursement;
- Cancellation of outgoing calls and messages to certain numbers or numbering ranges to be determined by the customer;
- Availability of pre-paid packages for access to public fixed telephone services;
- Deferred payment of access services to the public switched telephone network;
- The remedies in the event of payment default;
- Tariff advice; and
- Cost control tools, including a free alert system to consumers whose consumption patterns reflect a significant increase in the average usual consumption values.

Universal service providers

The 2004 Communications Law provides some detail as to each component of these services, most of which are almost obsolete. Initially, ANACOM declared PT as the universal service provider for these three services.

An ECJ decision challenged the previous award of universal service to the PT Group. In consequence, ANACOM issued a series of consultation procedures on universal service, notably on significant charges to be considered and tendering procedures for its provision by other providers.

A public tender was launched in 2012 to select the universal service obligation providers comprised the three aspects of the universal service. The public tender had the following results:

- NOS is now the provider of a connection to a public communications network at a fixed location;
- The provision of a publicly available telephone service over that connection in Portugal was also awarded to NOS; and
- The provision of a public payphone service and of a directory service were awarded to the PT Group.

As there were no bidders for the provision of directory services, ANACOM modified some of the service parameters and the Portuguese Government set out a procedure for the direct award of such services to the PT Group.

The Decree-Law No. 31/2003, of 17 February 2003, that laid down the framework of the communications public service concession, was revoked.

Following the revoking, the agreements regarding the Universal Service Providers listed above came into force in 2014. These agreements regulate in detail each aspect of the Universal Service, complementing the 2004 Communications Law,, among others:

- Price to be paid to the Universal Service Provider;
- Financing of the Universal Service;
- Rights and obligations of the Universal Service Provider;
- Geographical areas covered by the agreements.

Fees and charges

Electronic communications service providers are required to pay certain **fees** to ANACOM, such as:

- a fee to obtain declaration of the existence of individual rights;
- an annual fee applicable to network operators and service providers;
- a fee to ensure the right to use radio electric frequencies and numbering resources;
- fees for installation of electronic communications infrastructures (ITUR/ITED);
- other **charges**, such as the contribution to the Universal Service Compensation Fund.

Until the 2004 Communications Law, each municipality was free to apply municipal charges considering only its own interest, which caused difficulties and uncertainty to new entrants.

The 2004 Communications Law replaced the multiple fees by a single municipal fee.

ANACOM issued regulations related to the collection and delivery to Municipalities of the Municipal Fee for Rights of Way (*taxa municipal de direitos de passagem* - “**TMDP**”). TMDP is a charge due for the use of municipal rights of way for the installation, passage and crossing of systems, equipment and other resources by network and service providers of fixed electronic communications.

The amount to be charged is based on a percentage over the amount invoiced (VAT excluded) by the providers to consumers located in the municipalities that cannot be higher than 0.25 per cent, although each municipality is free to set out the exact amount.

TMDP is only applicable to fixed communications services. Public telephone service, virtual calling cards and wholesale communication services are excluded from TMDP.

A contribution to the financing of audiovisual and independent cinema by subscriber television service providers was established in 2012.

It was also established a compulsory investment obligation to video-on-demand service providers (“**VoD**”).

Outlook

It is expected that most operators will continue the process of adjustment from the turmoil caused by the recession of the beginning of the decade. The effects of the takeover of Portugal's incumbent by Altice is expected to continue to be felt in 2018.

Another important effect to look for in coming months is closely related to the high penetration rates of bundled services which effectively intertwine communication and content services. This means that traditional operators are relying ever more in access to television services as a source of revenue to their large multiple play client base.

Therefore, as a result, changes in neighboring markets such as content providers (e.g. local media groups as Impresa and Media Capital) are expected to impact the configuration of communication markets.

Perhaps the most significant of these changes is the acquisition of Media Capital (owned by Spanish media group Prisa) by Altice.

This merger, announced in mid 2017 and under review by AdC, will be finally approved or rejected in 2018. If approved, it will have a large and lasting effect in the access to critical content, such as entertainment and sport, and therefore in operator's revenues.

The competition on traditional services is not expected to grow. It is a fact that there is a clear substitution between traditional services and OTT's, which are a threat to revenues of incumbent network providers through features such as instant messaging, live video, audio calls and video on demand.

While it is expected that the regulatory framework remains stable in the near future, there is a growing pressure to widen its application to previously unregulated services.

Therefore, even apparently seamless OTT providers are facing mounting regulatory pressure, particularly on consumer protection issues.

Moreover, as most of these OTT services rely on advertising based revenues, their business model depends on their ability to use customers personal data. OTT providers major challenges for 2018 will certainly be the entry into force, in the first semester 2018, of the stringent General Data Protection Regulation ("GDPR") - Regulation EU 2016/679.

Key regulations

- ANACOM Notice No. 459/2017, published on 10 January 2017, setting out the rules on the security and integrity of electronic communications networks and services;
- Law No. 33/2016 of 24 August 2016, as amended by Law No. 2/2017, of 16 January 2017, which supports the expansion of the provision of DTT programme services, ensuring proper technical conditions and price control;
- Law no. 15/2016 of 17 June 2016, which enhances consumer protection in contracts for the provision of electronic communications services with a binding period (12th amendment to Law No. 5/2004, of 10 February 2014, the "2004 Communications Law");
- Administrative Rule No.32-B/2015 of 22 May 2015, awarding the PT Group for the provision of universal directory services;
- Decree-Law No. 39/2015 of 16 March 2015, which repealed Decree-Law No. 309/2001 of 7 December 2001 and establishes the new ANACOM statutes;
- Law No.35/2012 of 23 August 2012, which creates a compensation fund for the universal service; as last amended by Law No.149/2015, of 10 September 2015;
- ANACOM Regulation no. 114/2012 of 13 March 2012, on number portability;
- Law No.46/2011 of 24 June 2011, which creates the Competition, Regulation and Supervision Court;
- Law No.27/2007 of 30 July 2007 (as amended), approving the Television Law, which regulates the access to and provision of television broadcasting activity;
- ANACOM Regulation No.38/2004 of 29 September 2004, on the Procedures for Collection and Delivery to Municipalities of the TMDP (municipal fee for rights of way);
- Law No. 5/2004, of 10 February 2004 (the "2004 Communications Law"), as last amended by Decree-Law No.92/2017, of 31 July 2017;
- Decree Law No.151-A/2000, of 20 July 2000, as amended (the "2000 Radio Communications Law").



ABOUT US

Our Telecommunications Group

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In today's competitive global market, Macedo Vitorino & Associados can provide a comprehensive commercial and corporate law advice to domestic and foreign clients. We have strong relationships with many of the leading international firms in Europe and in the United States, which enable us to handle effectively cross border transactions.

Since the incorporation of the firm we have been involved in several high profile transactions in all of the firm's fields of practice, including banking and finance, capital markets, corporate and M&A, corporate restructurings etc..

We are ranked by The European Legal 500 in most of its practice areas, including Banking, Capital Markets, Project Finance, Corporate and M&A, Tax, Telecoms and Litigation.

Our firm is also mentioned by IFLR 1000 in Project Finance, Corporate Finance and Mergers and Acquisitions and by Chambers and Partners in Banking, Corporate and M&A, TMT, Dispute Resolution and Restructuring and Insolvency.

Since its incorporation in 1996, Macedo Vitorino & Associados has been involved in the development of several telecommunications projects, culminating in the liberalisation process in 2000.

We have advised clients in the following matters:

- Licensing of fixed telephone networks
- Licensing of mobile telephone networks
- Management and implementation of regulated offers
- Interconnection
- Supply and acquisition of equipment and networks
- Installation, operation and transmission of fixed and mobile networks
- Supply and acquisition of computer and management systems
- Administrative litigation

If you want to find out more about Macedo Vitorino & Associados please visit our website at www.macedovitorino.com



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