

The Right Time for MVNO in Portugal

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MACEDO VITORINO & ASSOCIADOS
Sociedade de Advogados, RL

About us

Macedo Vitorino & Associados was established in 1996, focusing its activity on advising domestic and foreign clients in specific activity sectors, including banking, telecommunications, energy and infrastructures.

Since the incorporation of the firm in 1996 we have been involved in several high profile transactions in all of the firm's fields of practice, including banking and finance, capital markets, real estate, M&A, complex disputes and corporate restructurings.

We have strong relationships with many of the leading international firms in Europe, the United States and Asia, which enable us to handle effectively any cross border legal matters.

We are ranked by The European Legal 500 in most of its practice areas, including Banking and Finance, 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 and Finance, Corporate and M&A, TMT, Dispute Resolution and Restructuring and Insolvency.

The multidisciplinary and integrated character of our corporate and commercial group allows us to efficiently solve the legal issues of our clients, in particular:

A Macedo Vitorino & Associados represents:

- Licensing and Regulation
- Landline Service Providers, Internet and Cable Television
- European Union Law and Competition
- Client Contracts
- Data Protection
- Contracts for online purchased goods
- Interconnection
- Telecommunication Project Finance
- Telecommunication Network Construction and Maintenance Contracts
- Information Technology (IT)

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

Foreword

Following a long and sometimes troubled liberalization process and over two and a half decades of massive investments, the Portuguese electronic communications market data portrays an extensive and diversified infrastructure capable of delivering some of the most advanced e-communication services to most of the country's population.

The first Portuguese electronic communications regulatory framework was enacted in 1989 under Law No.88/89 of 11 September 1989 to regulate the opening of the then called telecommunications network to private enterprises which has contributed to the progressive privatization of the Portugal Telecom group ("PT", now Altice), which was accompanied by a simultaneous movement to reduce the State's weight in the sector and the emergence of alternative offers to the incumbent operator in almost all telecommunications markets.

The 1997 Telecommunications Law brought a different approach and replaced the small step liberalisation with a broad principle of the market "full liberalisation" which accelerated the progressive opening of the Portuguese telecommunications market to new entrants and was completed on 1 January 2000 with the end of PT's legal monopoly over fixed telephony services.

Following the major review of existing EU electronic communications law that resulted in the adoption of a new regulatory framework for electronic communications in 2002, known as the "Review 99 package Directives", the Portuguese Parliament passed Law No.5/2004 of 10 February 2004, the "Communications Law".

The 2004 Communications Law reflected a dynamic and evolving approach to the market and was an indispensable step to ensure compliance with regulatory policy objectives. Despite the enactment of loose regulations, mostly fostered by misplaced political whim, as a general rule, Portuguese regulatory framework has been relatively stable.

Mobile network operators and service providers

Mobile network operators

Mobile Network Operators (“MNO”) are defined by having access to radio frequency licenses and direct access to end users. Those radio frequency licenses are granted administrative license conferring its holder the right to use a radiocommunications station or network for a radiocommunications service. In Decree Law No. 151-A/2000, of 20 July, in its Article 2, paragraph 1, h), a radiocommunications station is defined as one or more transmitters or receivers or a group of transmitters and receivers, including other ancillary equipment, which is able to provide a radiocommunications service or radio astronomy service, in a specific location.” According to subparagraph i), a radiocommunications network is the “entity comprised by various radiocommunications stations, which communicate with each other.”

MNOs are vertically integrated providers, offering a wide range of communication products available to various types of customers and usually combine, in a single package, the access and the corresponding telecommunication services.

Presently, the MNOs in Portugal are MEO, NOS and Vodafone.

MEO is the mobile arm of the former incumbent, Portugal Telecom, now Altice. NOS is a result of a merger in 2014, between Optimus and Zon. Vodafone was incorporated in 1992 as Telecel, part of Airtouch, later acquired by Vodafone.

There are other mobile not or less active wireless providers, that acquired spectrum licenses as *trunking* operators whose licenses are still valid. It should be noted, that although the frequencies provided for *trunking* were useless for the provision of mobile services in GSM/UMTS/LTE, they are useful in the context of the forthcoming 5G services, allowing to operate, at least partially, as hosts for service providers of the MVNO type. See, for instance, Wavecom, with Radio Trunking solutions in Oporto metro; at EDPR wind farms in Spain and all Portugal's wind farms interconnection.

Service providers: MVNO and resellers

Along with the full providers and the MNOs, there are a number of other operators, usually divided into MVNOs and traffic resellers. These, however, are characterized by having no access to radio frequencies but are still able to provide mobility-like communications services similar to MNOs retail services.

Mobile Virtual Network Operators

According to the Regulatory Framework for Mobile Virtual Network Operators issued by ANACOM on 09.02.2007, which sums up the applicable regime, a MVNO is a wireless communications services provider that enters into a business agreement with an MNO to access to network services at wholesale rates.

Although MVNO is a generic classification that encompass several types of operations, they all have in common the fact they do not hold spectrum licenses but rather support their activity on third party licenses to provide services to both residential (B2C) and business users (B2B).

As discussed below, the breadth of an MVNO operation varies from the simple resale of MNO services, in which, e.g., the former merely rebrands the service, to a much more complex operations in which the MVNO has complete control of all network elements, i.e. from core network to SIM cards, with the exception of radio access. In general, the wider the scope of an MVNO operation is the greater ability to differentiate their own offer they have.

Full and light MVNO

A light MVNO is characterized by having a reduced or no elements of the communications network infrastructure, despite having the necessary means to control their relationship with the end customer.

A full MVNO has elements of the transmission system and network infrastructure, except for radio access elements, e.g.: numbering code assignment, interconnection, roaming out, overall, elements that give autonomy in relation to the MNO.

Despite this traditional division, regulatory protection is given regardless of the model used.

Mobile Virtual Network Enablers and Resellers

MVNE are a subset of MVNO operations, in which the MVNE may provide to a third party a set services such as provisioning, or eventually core network services, but usually provides mobile application and content servers (MACS), which enable the management of business support, content and billing, leaving the MVNO to provide services to end users.

Considering that the solutions offered by MVNE are complex and may vary greatly, the assessment of the applicable regulatory framework must be tailored according to the type of services they intend to provide.

Resellers activity features a wide range from the simple purchase of mobile traffic for resale (national or international), which may or may not involve the provision of other services by the MNO or MVNE, until operations in which the reseller's independence extends to a level close to a MVNO.

A reseller is autonomous to the MNO that supports its resale service.

The Portuguese market

Currently, the existing MVNOs are G9Telecom, Lycamobile and Nowo.

ANACOM website lists six entities licensed as MVNO: G9Telecom, Lycamobile and Lycamobile Ltd, NOS, Nowo and Oni. In reality, the list is narrowed to only three entities, as not only Lycamobile refers to the same entity, but also because Nowo and Oni although separate companies belong to the same holding. As far as NOS is concerned as it is an MNO, the MVNO operation is not relevant.

Other mobile voice services and/or short data traffic resellers, offer mobile network tariffs supported by MEO, such as Heartphone; and resale service for voice telephone traffic and short data traffic resale (sms), such as CenturyLink, CLARA.NET, and Cyclop Net, among others.

As a whole, in 2019, MVNOs account for a market share of 2,6% of mobile voice subscribers and 1,1% of gross revenue (see [ANACOM facts and Figures 2019](#), published in April 2020).

Licensing

The general authorisation

MVNOs activity fits in the provision of electronic communications networks and services, subject to a general authorization, according to which companies wishing to offer electronic communications networks and services must previously file with ANACOM, a brief description of the network or service they intend to initiate while simultaneously, stating the intended date in which they expect to start their activity.

In general, after the communication, the MVNO commence its services providing the allocation numbering is not necessary.

Within five days of receiving the communication, unless clarifications are required, ANACOM issues a declaration describing in detail the rights of the new operator concerning access and interconnection, and, when applicable, other resources such as numbering.

Numbering

The provisions of electronic communications networks and services may involve rights of use for numbers. Those are allocated through open, objective, transparent, non-discriminatory and proportional procedures, by ANACOM. Application forms must detail the equipment the applicant entity plans to install and the services it intends to provide, with requested resources and the starting date communication. The decision on the application is issued by ANACOM within a maximum of 15 days.

Specifically, MVNOs may be assigned the rights to use the following numbering resources according to the National Numbering Plan, depending on the proven need: (i) mobile network identification numbers, (ii) numbers intended to provide the publicly available mobile telephone service, (iii) short numbers in ranges 16 and 18 (customer support services and information service), (iv) numbers for the provision of nongeographic services (ranges “6”, “7” and “8”), (v) addressing numbers in signage #7 (SS7) and (vi) identification numbers of card issuers.

The link to ANACOM's National Numbering Plan search tool may be found [here](#) (in Portuguese only). Like all other communications service providers, MVNOs are subject to number portability obligations.

Interconnection

Companies that offer publicly available electronic communications networks and services are entitled to negotiate all technical and commercial modalities of access and interconnection as it deems necessary.

Although the contractual freedom prevails in the negotiation and conclusion of interconnection agreements, the Communications Law grants a correlative general obligation of operators to negotiate interconnection, in order to guarantee the offer and interoperability of services.

Besides, ANACOM is responsible for encouraging, guaranteeing adequate access and interconnection, as well as services interoperability, determining access and interconnection obligations and acting on its own initiative when justified in order to ensure the regulatory objectives established by the Communications Law.

In case of refusal by other operators, MVNOs may invoke the obligation to negotiate the interconnection, the remaining operators shall ensure the interoperability of services under the terms of the law and, if necessary, resort to ANACOM. The refusal of interconnection is, however, unlikely, as the last major case involving interconnection dates back to 2002.

Spectrum fees

As MVNOs do not have rights to use frequencies for the provision of mobile telephone services, spectrum fees do not apply per se.

However, considering that the spectrum fees paid by MNOs to ANACOM also take into account the actual number of active mobile stations, particularly in the case of full MVNO, the issue of fees relating to the number of active SIM cards must be taken into account in the negotiation of agreements with their host providers.

Market analysis

According to Article 18 of the Communications Law, ANACOM is responsible for defining and analyzing relevant markets, declaring companies with Significant Market Power (SMP) and determining the appropriate measures for companies offering electronic communications networks and services. Applying competition law principles to determine the imposition of specific obligations on operators is a curious aspect of the European Union's regulatory framework.

The relevant markets identified match those on Recommendation 2014/710/EU of the European Commission, of 9 October 2014, on relevant product and service markets within the electronic communications sector susceptible of *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

- The identified markets for the purpose of *ex ante* regulation must comply with three cumulative criteria:
- The presence of high and non-transitory structural, legal or regulatory barriers to entry;
- A market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and
- Competition law alone is insufficient to adequately address the identified market failure(s).

The application of these three cumulative criteria contributes to reducing *ex ante* sector-specific rules progressively as competition in the markets develops, as failing to meet any of the three criteria would indicate that a market should not be identified as susceptible to *ex ante* regulation.

According to the 2014 Recommendation, the relevant markets sensitive to *ex ante* regulation are merely the ones at the wholesale level:

- I. Wholesale call termination on individual public telephone networks provided at a fixed location;
- II. Wholesale voice call termination on individual mobile networks;
- III. A) Wholesale local access provided at a fixed location.
B) Wholesale central access provided at a fixed location for mass-market products; and
- IV. Wholesale high-quality access provided at a fixed location.

The above-mentioned markets have been identified on the basis of the three cumulative criteria. ANACOM should start from a presumption that, in these markets, the three criteria are met. However, if ANACOM concludes that absent regulation at the wholesale level, the retail markets as defined displays sustainable competition, it should also conclude that *ex ante* regulation is no longer needed at the wholesale level.

Ex ante regulatory obligations are only imposed on non-effectively competitive markets, markets where there is one or more companies with significant market power (SMP), in which solutions under national and EU law on competition matters are insufficient to solve the identified competition problem.

The starting point of any analysis should be an assessment of relevant retail market(s). Having identified them, ANACOM should identify the corresponding wholesale market(s) to assess whether they are susceptible of *ex ante* regulation, in order to detect constraints that affect its competitiveness level and, inherently, the downstream retail markets.

Looking forward

No major changes are expected in the general authorization regime of the 2004 Communications Law applicable to MVNOs activity. Likewise, the Regulatory Framework for MVNOs activity, drafted by ANACOM in 2007, remains unchanged.

For both reasons, there are few regulatory barriers to the entrance of new MVNOs in the retail market, and there is plenty of room for the development of new strategies.

Additionally, in the proposed regulation for the forthcoming 5G Auction (see our paper on the proposed 5G Auction regulation [here](#)), ANACOM introduced a specific provision requiring that both new and incumbent MNOs are required to provide third parties access to their networks under non-discriminatory and fair conditions.

MNOs must accept to negotiate for the duration of the 5G spectrum licenses acquired, MVNO agreements, with severe penalties applying in case of noncompliance.


This is the right time for MVNOs to enter in Portugal, with the possibility of reaching specific niche markets yet to be explored, as well as new distribution channels, simplifying the actual system and organizational structures.

“Excellent. Very good lawyers with the ability to provide tailor made solutions, and a different approach to problem solving.”

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“Very efficient, detailed and thorough when presenting solutions and addressing the issues; we were impressed.”

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