

2023 | THE NEW PORTUGUESE

# ELECTRONIC COMMUNICATIONS LAW

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# About us

MACEDO VITORINO WAS ESTABLISHED IN 1996, FOCUSING ITS ACTIVITY ON ADVISING DOMESTIC AND FOREIGN CLIENTS IN SPECIFIC ACTIVITY SECTORS, INCLUDING BANKING, TELECOMMUNICATIONS, ENERGY, AND REAL ESTATE AND INFRASTRUCTURE.

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, real estate, M&A, complex disputes, and corporate restructurings.

We have strong relationships with leading international firms in Europe, the United States, and Asia, enabling us to handle cross-border legal matters effectively. We are mentioned 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:

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- Corporate and acquisition finance
- Dispute resolution, litigation, mediation, and arbitration
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# I. FOREWORD

With a considerable delay, in August 2022, Law 16/2022, of 16 August 2022 (“**Electronic Communications Law**” - “**ECL**”) implemented the European Electronic Communications Code<sup>1</sup> (“**European Code**” - “**EECC**”).

Despite the absence of changes in critical elements, the ECL brings in some crucial innovations regarding (i) consumer rights, (ii) sanctioning framework, and (iii) privacy in electronic communications.

Compared with 2005 electronic communications law (Law 5/2004, of 10 February 2004), the ECL has a more extensive scope due to a broader definition of “*electronic communications service*”. Under the new definition, in addition to the individually addressed signal services delivered through electronic communications networks, “*electronic communications services*” now include other services not dependent on numbers, such as internet access services, *machine-to-machine* communications and the so-called *over-the-top* services (“**OTT**”).

The rules entered into force 90 days after the ECL enactment (14 November 2022), with the following exceptions:

- Rules covering the charges required in the event of early termination of the agreement on the consumer's initiative (see articles 136/4 and 136/5 of the ECL) will enter into force only 60 days after its publication, *i.e.*, more precisely, on 13 January 2023;
- Rules on emergency communications and a single European emergency number which shall take effect from the moment the access to an emergency service is opened to the public by the competent national authorities; and
- Rules on network and service security, including additional requirements and assistance and cooperation arrangements with the National Computer Security Incident Response Team (*Equipa de Resposta a Incidentes de Segurança Informática Nacional*), which came into force immediately with the publication of the ECL.

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<sup>1</sup> [Directive \(EU\) 2018/1972 of the European Parliament and of the Council of 11 December 2018.](#)



It is worth mentioning that, back in 2004, the Portuguese legislators had already unified five EU Directives<sup>2</sup> into a single piece of legislation, creating a structurally cohesive framework that was broadly maintained until 2022. Even so, by mid-2021, in addition to the 2004 Electronic Communications Law, the Portuguese communications' regulatory framework consisted also of 46 other diplomas: 23 laws and 16 administrative regulations<sup>3</sup>.

Therefore, it is not a surprise that, despite substantive changes, particularly regarding consumers and the sanctioning framework with a material impact on the operators' financial and operational balance, the ECL has generally preserved the structure of the preceding legislation.

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<sup>2</sup> [Directive 98/84/CE](#); [Directive 2002/77/CE](#); [Directive \(UE\) 2018/1972](#); [Directive 2002/58/CE](#) ; [Directive 2011/83/UE](#)

<sup>3</sup> Cf. João Macedo Vitorino, Pedro Ramalho de Almeida et al., *Sweet&Maxwell Global Telecommunications R.76*, Chapter 28, PO-08, page 5064, London, June 2021.

## 2. ANACOM AND OTHER COMPETENT AUTHORITIES

The Portuguese Communication Authority (*Autoridade Nacional de Comunicações* - "**ANACOM**") is Portugal's National Regulatory Authority (*Autoridade Reguladora Nacional* - "**NRA**") for the communications sector.

The definition of "communications", which serves to set ANACOM's scope, includes electronic and postal communications. The ECL clarified ANACOM's role in areas where its jurisdiction was undefined and extended its role to new market sectors.

As an example, the ECL's expanded regulatory authority now covers Over-The-Top (OTT<sup>4</sup>) services. While these services operate exclusively at the application level of data transmission networks<sup>5</sup>, the ECL classifies OTT as network services for legal and market analysis purposes, including what concerns end-users' rights.

The ECL assigns ANACOM a broad range of regulatory, supervisory, control, and enforcement responsibilities for the entire communications sector. Specifically, ANACOM is responsible for the following:

- Promoting the competition in the electronic communications networks and services supply;
- Ensuring access to networks, infrastructures, facilities, and services;
- Protecting the rights and interests of consumers and other end-users; and

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<sup>4</sup> OTT or "over-the-top" refers to any service or application that delivers audio, video, or other media over the internet without requiring a traditional cable or satellite subscription (e.g. streaming platforms such as Netflix, Hulu, and Amazon Prime Video and social media apps like Facebook and Instagram).

<sup>5</sup> According to the conceptual framework of the OSI (*Open Systems Interconnection*) network interconnection reference model, the level of application (level 7) is the closest to the end-user and therefore farthest from the physical and logical connection levels at which communications services and, consequently, their regulation traditionally operates.

- Ensuring access to the universal electronic and postal communications service, including by enforcing universal service obligations.

Among other changes, the ECL grants ANACOM additional powers and responsibilities, particularly around spectrum management. ANACOM now has the authority to promote shared use of the radio spectrum, where multiple operators can access the same frequency bands through the allocation of rights of use for frequencies (in Portuguese, “*Direitos de Utilização de Frequências*” or “DUF”).

Additionally, the ECL clarifies that regulations for competitive or comparative selection procedures for radio spectrum rights of use will be approved by the government official in charge of the communications sector.

The ECL is aligned with the European Electronic Communications Code in including the participation of “*other competent authorities*” in the communications sector. These entities, such as the National Authority for Emergency and Civil Protection (*Autoridade Nacional de Emergência e Proteção Civil* – “**ANEPC**”), are legally granted specific powers, particularly when it comes to end-users rights.

For this reason, the ECL mandates ANACOM to cooperate with “*other relevant entities*” in organising public consultations and sharing information on matters of joint interest related to emergency communications.

# 3. GENERAL AUTHORISATION, FREQUENCIES, NUMBERS AND SECURITY

## 3.1. GENERAL AUTHORISATION FRAMEWORK

The provision of electronic communications networks and services is free; companies are free to offer electronic communications services without the need for prior authorisation from the regulator, except for the allocation of rights of use for elements such as frequency bands (DUFs) and numbering rights.

Companies that wish to provide public electronic communications networks and publicly available electronic communications services are required to notify ANACOM before starting operations. This notification must include the following:

- A statement of the applicant's intention to begin operations;
- Identification details of the applicant, as well as its website associated with the provision of public electronic communications networks and publicly available electronic communications services;
- Contact information for communications and notices, including a mandatory email address;
- A brief overview of the planned network and services; and
- The expected service launch date.

It is worth mentioning that companies not subject to the general authorisation regime under the ECL are not required to fulfil this prior notification to ANACOM requirement before launching their operations. Similarly, this requirement does not apply to providers of electronic communications services not intended for public access.

Through specific regulations, ANACOM may also exempt from this requirement companies providing specific public electronic communications networks and publicly available electronic communications services.



## 3.2. GENERAL AND SPECIFIC CONDITIONS

Companies providing electronic communications networks and services will continue to be bound by several general conditions established in the previous law. These include:

- Access obligations;
- Obligations related to the processing of personal data and the protection of privacy in the electronic communications sector;
- Obligations to install and make lawful interception systems available to national authorities and to provide decryption means when such facilities are offered;
- Conditions of use of the radio spectrum for electronic communications services; and
- Conditions of use to ensure communications between emergency services, competent authorities, and civil protection agents with the public in general.

Entities not subject to the general authorisation regime are not subject to these general conditions.

In addition to these, companies providing electronic communications networks and services may be subject to specific conditions, particularly in relation to access and interconnection, retail market controls, and universal service.

Finally, it is also important to note that companies offering independent interpersonal communications services may, in certain cases, be subject to access and interconnection obligations under the changes introduced by the ECL.

## 3.3. OPERATOR'S RIGHTS

The ECL grants rights to companies providing electronic communications networks or services, whether intended for public access or not, including the right to request the establishment of rights of way and the right to use the radio frequency spectrum to deploy their networks and services.

Companies offering public networks or services have additional rights such as the right to apply as universal service providers or to deploy their coverage in all areas of the country.

These rights may be modified by legislation, regulatory or administrative statutes, provided these are objectively justified and proportional, and must be approved by the rights holder, and are subject to a public consultation procedure, which allows interested parties to offer their view, unless the changes are considered insignificant or do not affect the fundamental nature of the rights of use.

The holders of DUF as well as numbering resources have a general guarantee of non-restriction and irrevocability of these rights until the end of their validity period. However, the law sets out criteria by which these rights may be restricted or revoked in advance by the NRA. Such cases include:

- Permission given by the holder;
- Justified circumstances to ensure the effective and efficient use of numbering resources or radio spectrum; and the application of technical implementing measures adopted under article 4 of the Radio Spectrum Decision.<sup>6</sup>

Restriction or revocation of rights without the consent of the holder or in unjustified cases must follow a legal procedure that respects the principles of proportionality and non-discrimination.

In case of restriction or revocation, holders are entitled to compensation for any unique and abnormal charges or damages suffered, which will be calculated by ANACOM under the State and other public entities' extra-contractual liability rules.

Summarising, the ECL does not bring significant innovations in this area, but it clarifies that the rules apply to Over-The-Top (OTT) services and companies that wish to offer electronic communications services not accessible to the public.

### 3.4. THE RADIO SPECTRUM

The radio frequency spectrum, through which electromagnetic waves with frequencies between 3kHz and 3000GHz may be transmitted, constitutes a public resource of great economic and social importance for the country. This is evident not only in the amounts paid for rights to use it but also in the intense public debate surrounding issues related to it<sup>7</sup>.

ANACOM is responsible for the management of the spectrum and must promote its efficient use pursuant to the principle of technological and service neutrality. The first of these principles states that any forms of technology may be used in the frequency bands allocated to electronic

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<sup>6</sup> [Decision 676/2002/EC of the European Parliament and of the Council of 7 March 2002](#) on a regulatory framework for radio spectrum policy in the European Community.

<sup>7</sup> On this topic, see, by way of example, the 2017 Study on Extending the Offer of Program Services on Digital Terrestrial Television (DTT), which can be consulted directly on the website of the Portuguese Parliament [through this link](#).

communications services, and the second that any type of electronic communications services may be offered through the available frequency bands.

The ECL did not make any fundamental changes to ANACOM's role, which continues to hold most of the powers it previously had, such as the power to assign, modify, or renew rights of use, and even the power to authorise their transfer or lease.

Following the 5G DUF auction debacle, the ECL introduced two seemingly contradictory changes on future frequency awarding procedures. On the one hand, new powers are granted to ANACOM, as regarding the protection of competitive usage of frequencies. At the same time, ANACOM was stripped of the ability to decide on the selection frequency allocation procedures, which the Government must directly approve.

From a legal perspective, the regulator is responsible for establishing the general conditions for authorisation and determining the most appropriate technical requirements for the use of the radio spectrum.

The ECL reiterates that ANACOM's responsibilities for granting rights of use for frequencies of electronic communications networks or services. These rights are always subject limited in time. For example, rights of use for the spectrum for wireless broadband electronic communications services are granted for 15 years, subject to possible renewal.

Like the previous regime, ANACOM is also responsible for defining conditions associated with the rights of use of the spectrum, which, if breached, allows the regulator to revoke the rights of use or impose other measures. These conditions must be proportional, transparent, and non-discriminatory, such as setting maximum periods of rights of use.

The ECL innovates by introducing the possibility of shared use of the radio spectrum.

The renewal of rights of use is possible, but the renewal rules have been significantly changed under by the ECL:

- Under the previous law, the renewal of rights of use for the radio frequency spectrum was solely dependent on the initiative of the holder; and
- Under the ECL, ANACOM may proactively determine the need for the renewal for the radio frequency spectrum.

Holders of rights of use for the radio frequency spectrum may also apply for renewal to the regulator on their own initiative, at least 18 months and no more than five years before the expiration date. It is worth noting that the previous law only allowed for a minimum of one year's notice. In any case, the regulator must respond to renewal requests within a maximum period of six consecutive months, starting from the date of receipt.

In the case of rights of use whose number is limited, interested parties must be given the opportunity to provide their opinions on the renewal during a public consultation procedure.

Since rights of use are licensed to operators, they are subject to periodic payment of fees, which, except in exceptional cases, are mainly intended to cover the costs of radio supervision.

Finally, it is worth mentioning that the National Frequency Allocation Framework (*Quadro Nacional de Atribuição de Frequências* - "**QNAF**", which may be accessed through this [link](#)) is the instrument for the technical management of the radio spectrum, which defines the conditions of use according to its purpose.

### 3.4.1. TRANSFER AND LEASE OF RIGHTS OF USE

The ECL allows the transfer or leasing of rights of use for the radio spectrum.

As a rule, if the holder of the right wishes to transfer or lease it, they can do so through a request to the regulator. The regulator must then decide within 45 business days.

However, in some cases, the transfer or leasing of rights of use is not permitted. These cases include, for example, rights that have been allocated free of charge or for the provision of radio program services and the distribution of television and radio program services, as part of specific procedures for meeting public interest objectives.

### 3.4.2. COMPETITION

Under the ECL, the NRA must promote effective competition in the European Union internal market when allocating, modifying, or renewing rights of use for frequencies, by avoiding any distortion of competition to the extent possible. In this context, ANACOM, as the NRA, has been given strengthened powers to adopt or propose remedies to other competent authorities to prevent competition distortions. These measures may include, among others:

- Restricting the number of spectrum bands for which rights of use are granted or attaching conditions to these rights;
- Setting aside parts of a spectrum band or group of bands for allocation to new market entrants; and
- Refusing to grant new rights of use or authorize new uses of spectrum in specific bands, and attaching conditions to their allocation, transmission or lease, to prevent competition distortion.
- In taking such measures, the regulator should base its decisions on an objective and prospective assessment of the competitive conditions in the market and the necessity of such actions.



### 3.5. NUMBERING RESOURCES

The ECL establishes ANACOM as the entity responsible for managing numbering resources in Portugal.

The “numbering resources”, that is the structured set of codes used by electronic communications networks to route signals, are part of the National Numbering Plan (*Plano Nacional de Numeração* – “**PNN**”, [accessible through this link](#)), or an international numbering plan<sup>8</sup>. ANACOM has the power to administer and assign these numbers, which can identify networks, network elements, end-users, services or applications using these services and networks.

The ECL states that ANACOM is responsible for ensuring that numbering resources are available for the provision of public electronic communications networks and publicly available electronic communications services.

Companies must submit a specific and justified request to ANACOM to be allocated the rights to use these resources.

ANACOM uses the National Numbering Plan as the technical tool to manage the allocation of these numbers, which also includes the criteria for each number range.

### 3.6. SECURITY AND EMERGENCY

The ECL not only outlines general responsibilities for the coordination of electronic communication networks and services during crisis, war, serious accidents or disasters, and threats to internal security, but also emphasizes two specific regulations:

- First, companies offering mobile interpersonal communication services based on numbers must provide free public warnings in the event of imminent or ongoing emergencies, accidents, or disasters; and

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<sup>8</sup> The codes corresponding to the international numbering plans for electronic communications networks are assigned and managed within the International Telecommunications Union (“**ITU-T**”) which, since 1865, has been the organisation responsible for defining the critical standards for the interoperability of electronic communications infrastructures (“**ICT**”), whether for voice, video or data transmission systems at a global level. In the words of the **ITU** itself, in short, it is about ensuring that “all ICT networks and equipment in all countries speak the same language”.

- Second, all end-users of communication services have the right to access the European emergency number 112, free of charge, to make emergency calls.

# 4. MARKET ANALYSIS AND REGULATORY CONTROLS

## 4.1. GENERAL PROVISIONS

According to the ECL, the market analysis and the imposition of specific undertakings must comply with the principle of full justification, meaning that decisions must be based on legal requirements and follow a prior public consultation procedure.

The definition of relevant products and *geographic markets* in the telecommunications sector and the determination of which companies have significant market power are ANACOM's responsibilities.

## 4.2. MARKET ANALYSIS

The ECL assigns ANACOM the responsibility of defining and analysing the relevant product and service markets in the electronic communications sector, considering the level of infrastructure competition in those areas.

Based on this analysis, ANACOM may determine that it is necessary to impose specific obligations when:

- There are barriers to market entry;
- The market structure does not allow for effective competition; and
- Competition Law alone is not sufficient to address specific shortcomings.

This analysis can be conducted not only for national and transnational telecom markets, in cooperation with European authorities.

## 4.3. OBLIGATIONS ON OPERATORS WITH SIGNIFICANT MARKET POWER

The ECL maintains the traditional definition of significant market power is a strong economic position allowing a company to act independently of its competitors, customers and end-users.

Like the previous law, the ECL allows the regulator to impose certain obligations on companies that have significant market power. These obligations may include the following:

- The requirement to meet reasonable requests for access to and use of infrastructure, such as civil engineering assets owned by the company;
- In the absence of effective competition, the regulator may impose cost-oriented pricing and cost accounting system obligations for specific types of interconnections and access. However, the ECL now has stricter conditions for applying these obligations. ANACOM must consider the benefits of having predictable and stable wholesale prices that encourage efficient market entry and incentives for companies to develop new and more advanced networks, particularly in areas of low population density; and
- The ECL aligns with the European Electronic Communications Code by recognizing that establishing a wholesale market can positively affect retail market competition, reducing competitive risks.

As a result, wholesale companies will be subject to a more favourable regulatory regime. They may only be required to comply with non-discrimination obligations, access and use of specific network elements and associated facilities, or obligations related to fair, equitable, and reasonable pricing. However, the applicability of this rule is dependent on the company meeting strict cumulative requirements. This may make it difficult for some companies to qualify.

Companies with significant market power are now subject to specific obligations regarding infrastructure migration. For example, to address the potential competitive consequences of migration from old copper networks to next-generation networks, legislation requires these companies to provide prior notification when they plan to deactivate or replace their infrastructure, in whole or in part.

Access obligations do not only apply to companies with significant market power. To ensure some level of economic efficiency, the regulator has the power to impose required access obligations on operators or owners of cabling and associated facilities inside buildings, or up to the first point of distribution outside the building, regardless of whether they are companies with significant market power. This will help to strengthen symmetric regulation, which applies to all operators<sup>9</sup>.

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<sup>9</sup> Opposed to asymmetric regulation, applicable only to companies with significant market power.



## 4.4. ACCESS AND INTERCONNECTION

### 4.4.1. INTERCONNECTION

Companies providing electronic communications networks and services are free to negotiate and enter into interconnection agreements.

ANACOM has the authority to impose access and interconnection obligations on companies with or without significant market power, as long as they are objective, proportionate, transparent, and non-discriminatory. The regulator may impose, for example, access and interconnection obligations on companies that, due to their general authorisation status, control access to end-users.

### 4.4.2. REGULATORY OBLIGATIONS

The new law closely follows the EECC and maintains the regulatory obligations established by the previous legislation. However, the ECL also introduced new regulatory obligations that are more stringent and complex.

One example of this is the new law's emphasis on symmetric regulatory obligations' measurement. This includes access obligations, such as access to cabling up to the first distribution point, and the power to impose access to civil engineering assets and national roaming. These new provisions are meant to provide more regulatory oversight and ensure fair competition in the market. However, the requirements for these regulatory obligations have become more stringent and have made these rules more complex to implement.

While these new rules may have been introduced to improve user protections, they may raise concerns regarding their implementation complexity.

### 4.4.3. NATIONAL ROAMING OBLIGATIONS

Following the EECC, the ECL introduces the concept of national roaming. This is viewed as an important regulatory mechanism to overcome physical or economic barriers in the provision of services and networks requiring on access through rights of use for radio spectrum frequencies (namely, mobile network providers) for end-users.

When access and sharing of passive infrastructure are not sufficient to ensure adequate coverage, the regulator may impose obligations for active infrastructure sharing or the obligation to conclude national roaming agreements. However, these obligations may only be imposed if certain requirements are met, such as the existence of insurmountable physical or economic hurdles that result in poor or non-existent access to end-users, such as building limitations in protected areas.

The recourse to this mechanism will only be justified when there is an insufficiency of access and sharing of passive infrastructure.

#### 4.4.4. INTERNATIONAL ROAMING

International roaming is a service offered by early 2G mobile networks that allow customers of one operator to use their mobile devices on the networks of third-party operators in different countries. This service is essential and enables users to make and receive voice calls, send, and receive text and multimedia messages, or access the internet through their equipment. It is one of the most important factors that contributed to the global popularity of mobile services over GSM networks.

However, roaming costs traditionally are higher than those of the home network, as third-party operators are free to set their own fees for visiting users. Although in the European Economic Area, these costs have been decreasing due regulatory pressure, since to the implementation of the EU's "Roam Like at Home" concept in 2017, international roaming users in the Union are charged the same tariffs as in their home network.

It's worth noting that international roaming is not regulated by the ECL, but by European regulations, specifically by [Regulation \(EU\) 2022/612 of the European Parliament and the Council of 6 April 2022](#).

#### 4.5. REGULATORY CONTROLS IN RETAIL MARKETS

The imposition of specific obligations appropriate to retail markets by ANACOM depends on:

- Absence of effective competition; and
- The imposition of further obligations would not meet the general aims of regulation.

The law aims to prevent excessive pricing by operators and that they discriminate end-users.

# 5. USERS' RIGHTS, UNIVERSAL SERVICE AND ADDITIONAL MANDATORY SERVICES

## 5.1. END-USERS' RIGHTS

Companies, including OTTs, offering networks or services are now, in their entirety, subject to the rules of end-user's rights outlined in the ECL.

As an exception are the micro-entities<sup>10</sup> number-independent one-to-one communications services, which although exempt from these regulations, must nonetheless inform end-users of this subject.

According to the ECL, in addition to end-users who are consumers, the rights apply to micro-entities, small enterprises, or non-profit organisations, if they have not waived their application.

Under the ECL all end-user is entitled to:

- Have written information about the terms and conditions of access and use of services;
- Be informed, at least 15 days in advance, of the operator intention to cease the provision of a specific service;
- Have information about expected and provided service levels;
- Receiving itemised billing, detailing, among other things, information about costs and the end of the minimum contractual period;
- Increase protection in cases of express non-authorisation/contract;
- Have access to pricing and other conditions tools;

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<sup>10</sup> A micro-entity is a very small company employing fewer than ten workers, has a total annual turnover or annual balance sheet not exceeding two million euros, and fulfils independence criteria, i.e., it is not legally controlled or otherwise related to companies that do not meet these requirements.

- Have an immediate and proportional reduction in the monthly fees in cases of failings in the quality of service, without prejudice to other compensation that may be due;
- Continuous access to the contracted services, and information about the suspension of the service; and
- Number portability.

Broadly speaking, the protection of end-users became a core aspect of the ECL. Paradoxically, in its attempt to empower users, the ECL seem to have taken a step too far while, at the same time, failing to provide adequate guidance, thus creating an unwelcomed and unexpected sense of uncertainty. As an example, under the ECL, operators are banned from unjustifiably discriminate against customers on the ground of nationality and place of residence; however, no guidelines on what may be construed as justifiable discrimination were provided. This is a sensitive matter that may lead to future litigation.

The ECL seeks to empower end-users by ensuring fair treatment in the market. The protection of end-users is a core aspect of the ECL. As part of the framework, these non-discrimination rules ensure that consumers have equal access to services and that companies cannot discriminate against users based on their nationality or domicile.

## 5.2. AGREEMENT INFORMATION REQUIREMENTS

The ECL strengthens the framework for the disclosure of pre-contractual information. Under the ECL, public communication providers and operators, except machine-to-machine service providers, are now required to make available to the consumer, before entry into an agreement, information (under the [Consumer Protection Act](#)) concerning its key aspects. Among other things, operators are required to disclose information on:

- The main characteristics of the goods or services;
- The identity of the provider, including, company name, postal address and telephone number and other contact information;
- The total price of the services, including the fixed fees and applicable taxes, additional set-up charges, and other relevant charges, including those relating to maintenance; and
- The price calculation method, in cases where, due to the nature of the service, the price cannot be calculated before the conclusion of the agreement.

The ECL also formalizes the obligation to adopt and make available the agreement summary template, making it considerably more detailed.

### 5.3. CONTROL MECHANISMS FOR CONTRACTING AND INVOICING

According to the ECL, the billing for publicly available electronic communications services must be done monthly, and the invoices for these services must be sent free of charge to the end user and include the following information:

- The services provided and the corresponding prices;
- The remaining term to complete the minimum contractual term obligations; and, when applicable,
- The social tariff for providing broadband Internet access services and its application to consumers with low incomes or special social needs.

### 5.4. DURATION OF THE AGREEMENT

Due to the prevalence of bundled services (triple, quadruple and quintuple play, with implied discounts<sup>11</sup>) particularly in the residential fixed-line market segments, local operators tend to waive set-up fees and replace them with minimum contract periods, which, if infringed, will give rise to steep early termination fees. Therefore, it is no wonder that minimum contract periods<sup>12</sup>, is probably the most debated issue in consumer law.

However, the ECL still emphasised its continuity when it comes to minimum contract period and early termination charges, opting to make surgical changes such as clauses by introducing the concepts of *initial* and *follow-up* minimum contract period and capping them.

Therefore, operators offering publicly available communication services, are required to offer services without any customer lock in period, and the minimum contract period was limited to 24 months.

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<sup>11</sup> In the 3Q2022, only 15,4% of fixed residential accesses was attributable to single play (ie, internet access or simple fixed telephony).

<sup>12</sup> Which literally translates as commitment period, loyalty period or a customer lock in period.

Furthermore, the subscription to supplementary services or terminal equipment by the consumer, may not be used to extend the initial contractual loyalty period, except when the consumer agrees to it at the time of subscription.

## 5.5. TERMINATION OF THE AGREEMENT

Regarding contract termination, in its quest to protect consumers, the ECL introduced some significant deviations to general principles of law, particularly, on contract default and liability. While these are naturally restricted to specific contracts, they are nevertheless of interest.

According to the ECL, suspension of services to defaulting non-consumer end-users is allowed but subject to notice. It should be noted that in any case cutting off access to emergency services is not permitted.

For defaulting consumer end-users, a notice must be served for a grace period of at least 30 days comes into effect, after this period elapses, the operator is allowed to suspend the service for an additional 30 days. Once this second period elapses, and provided that certain notification requirements are met, the contract will be automatically terminated without further notice.

On the other hand, in cases of services unavailable for longer than 24 hours, the ECL imposes a proportional reduction of the bill regardless of any consumer's request. If the service remains unavailable for over 15 days, the end-user has the right to terminate the agreement without any cost.

Also in this case, the ECL established other specific causes for breach of agreement in addition to those previously mentioned.

One example of these new provisions is the fact that the ECL considers the existence of “*significant discrepancy between the actual performance of the services and the performance indicated in the agreement*” may serve as the basis for the end-user's demanding corrective measures, which are not defined, notwithstanding, its right to terminate the agreement without any penalty. Again, it will be interesting to see how the courts will apply these arguably vague concepts.

As mentioned above, the ECL introduced specific changes on the admissibility of minimum contract periods, along with the mentioned restrictions; the law has also restricted the early termination charges in case these lock-in periods are not complied with by the customer.

The ECL considers that a customer may be able to terminate its agreement with an operator without incurring any early termination charges if the consumer:

- Changes their address, the company cannot demand additional charges if it cannot provide the contracted service or equivalent service in terms of characteristics and price at the new

address; The consumer changes its permanent address and, cumulatively, the address is the primary location of the services provided by the operator, and the operator is unable to provide the same or an equivalent service at the new dwelling;

- Loses their disposable monthly income due to unemployment through no fault of their own;
- Is permanently or temporarily incapacitated for work or loses monthly income due to a long-term illness;
- Migrates to a third country. For this purpose, emigration is defined as the unforeseeable move of the contract holder's permanent residence out of the national territory; or
- Is absent from its residence due to imprisonment or by being dependent on the care provided by a third person.

Although the ECL sets these causes of breach of contract to protect particular cases in, what undoubtedly the legislator thought to be fair cases, the overuse of vague concepts such as “unforeseeable move (...) out of the national territory” or “loss of income due to illness” will not contribute to a peaceful application of the law soon.

## 5.6. UNIVERSAL SERVICE

The ECL has set these causes of breach of agreement with practical consequences to reinforce the protection of end-users and make the termination process fairer.

According to the ECL, universal service is a minimum set of services that must be available to all consumers at an affordable price in the national territory, considering specific national conditions. The aim is to prevent social exclusion resulting from lack of access and enable citizens to participate in social and economic life.

Universal service should ensure the availability of the following:

- An adequate broadband internet access service at a fixed location;
- Voice communications services, including the underlying connection, at a fixed location; and
- Specific measures for consumers with disabilities to ensure equivalent access to services available to other users.

The ECL brings about some important changes to universal service, particularly promoting social regulation mainly through the so-called "social internet tariff".

## 5.7. ADDITIONAL MANDATORY SERVICES

According to the ECL, the government may make additional services available to the public within the national territory beyond those included in the universal service obligations. However, in those cases, a compensation mechanism involving specific companies should not be imposed.



## 6. TRANSPORT OBLIGATIONS AND EQUIPMENT

ANACOM may, for public interest reasons, impose signal transportation obligations on companies in the television and radio program services market and provide adequate compensation in return.

To comply with the ECL, digital television equipment used by consumers must be able to decode digital television signals and reproduce signals that have been broadcast without encryption, and providers must also facilitate the interoperability of equipment to encourage reuse.

Lastly, any activity involving illegal devices, including the manufacturing, importing, distributing, selling, renting, installing, maintaining, promoting, acquiring, and using such devices, is considered a severe administrative infraction.

An illegal device is any equipment or software designed or adapted to allow unauthorised access to protected services in an intelligible form without the service provider's consent.

# 7. FEES, SUPERVISION AND CONTROL

## 7.1. RATES

Operators who offer communication networks and services under the general authorisation framework are subject to an annual fee. This fee is based on the administrative costs of managing, controlling, and enforcing the general authorisation framework, as well as the rights of use and specific conditions.

Additionally, operators are also responsible for paying fees related to the following:

- The allocation and renewal of frequency rights;
- The allocation, reservation, and renewal of numbering resource rights; and
- The allocation of rights of way.

## 7.2. SUPERVISION AND CONTROL

### 7.2.1. DISCLOSURE OF INFORMATION

To effectively carry out its responsibilities, ANACOM has the right to access and to require information from operators as it sees necessary, if it is deemed objectively justified, non-discriminatory and reasonable.

Specifically, companies must provide financial information as any additional information that ANACOM or other competent authorities may request, if counted as necessary and objectively justified, to ensure compliance with administrative charges, authorisation, and other specific obligations imposed on these companies. In general, operators must provide financial and technical information to guarantee compliance with administrative charges, authorisation and other specific obligations arising of the services operators are registered to provide.

### 7.2.2. CONTROL

As a regulator, ANACOM is responsible for supervising compliance with the ECL, the Portuguese Food and Economic Security Authority (*Autoridade de Segurança Alimentar e Económica* – “**ASAE**”) and the Portuguese Tax Authorities (*Autoridade Tributária e Aduaneira*). As

a regulator, ANACOM is responsible for overseeing the electronic communications sector overall.

However, under the ECL and other applicable statutes, judicial courts, central Government agencies, such as the national cybersecurity agency (*Centro Nacional de Cibersegurança – “CNCS”*) and other authorities and agencies also have some degree of jurisdiction over the sector. Among them, there are the above-mentioned **ANEPC** (the emergency and civil protection agency), the Food and Economic Security Authority (*Autoridade de Segurança Alimentar e Económica – “ASAE”*), the Competition Authority (*Autoridade da Concorrência – “AdC”*), the Tax and Customs Authority (*Autoridade Tributária e Aduaneira – “AT”*) and the municipalities.

### 7.2.3. NEW SANCTIONING FRAMEWORK

The ECL has significantly expanded its sanctioning framework. It includes more than 120 administrative infractions, of which almost 97% are considered severe or very serious and can result in fines of up to one million or five million euros.

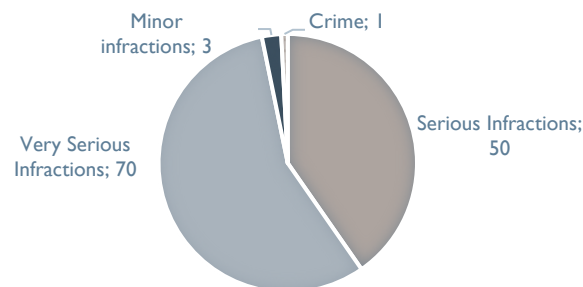


Figure 1 - Distribution of administrative offences foreseen in the ECL according to their seriousness.

Regarding compliance with the end-consumers rules, more than 40 applicable sanctions represent more than a third of the total number of the ECL’s administrative infractions.

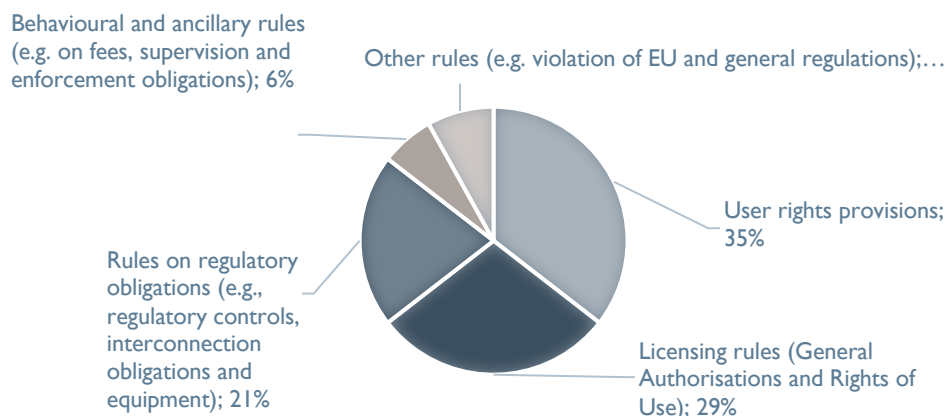


Figure 2 - Distribution of sanctioning rules according to the subject (as a % of the total number of administrative offences provided for in the ECL).

Under the ECL, issuing guidelines, recommendations, or instructions to employees, agents, or business partners prone to result in a violation of rules or ANACOM's instructions is considered a severe administrative infraction.

As opposed to the initial version of the bill presented by the government in May 2022<sup>13</sup>, the ECL does not provide for individual liability for members of management bodies and company directors.

Along with a long list of violations for which operators are liable, under the ECL, a severe or very serious administrative offence is committed whenever an operator issues its employees, agents, or business partners guidelines, recommendations, or instructions that are likely to result in a violation of rules or ANACOM's instructions.

It should be noted that this type of provision is uncommon in this context in Portuguese law. However, it should be noted that this provision seems to be a compromise in relation to the initial version of the bill submitted to Parliament<sup>14</sup>, where personal liability of company directors and senior staff of the operators was proposed. Considering the broad and ambiguous wording of these sanctioning provisions, it will be interesting to see how they will be applied.

<sup>13</sup> Proposal of Law 6/XV 22 April 2022 (available at [www.parlamento.pt](http://www.parlamento.pt) and that can be accessed [through this link](#)).

<sup>14</sup> Proposal of Law 6/XV 22 April 2022 (available at [www.parlamento.pt](http://www.parlamento.pt) and that can be accessed [through this link](#)).

## 8. OPEN INTERNET PRINCIPLE

The open internet principle guarantees that citizens of the European Union have unrestricted access to online content and services, regardless of location or time, without any form of discrimination or interference from internet service providers.<sup>15</sup>

This is reflected in Portuguese law through the ECL, which states that any actions taken to maintain the quality of internet access must comply with [\*Regulation \(EU\) 2015/2120 of the European Parliament and of the Council, of 25 November 2015\*](#).

The principle of an open internet is crucial today, where information is readily available through the internet. This principle is essential to guarantee that individuals and companies have unrestricted access to online content and services.

For example, internet service providers are prohibited to block or slow down their competitors' content, applications, or services, except in limited cases, such as network security and integrity. Under this principle, e.g., internet providers must prevent unjustifiable blocking or slowing down content, applications, or services, except in limited cases, such as to maintain network security and integrity. Similarly, service providers are inhibited from prioritising traffic on their networks based on payment from a particular source. At the same time, they are required to provide equal access to online content and services without interference from the interests of internet service providers.

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<sup>15</sup> Cf. [\*Regulation \(EU\) 2015/2120 of the European Parliament and of the Council of 25 November 2015\*](#) establishes the principle of the open internet in the EU, as amended by [\*Regulation \(EU\) 2018/1971 of the European Parliament and of the Council of 11 December 2018\*](#).

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