

# Portuguese Telecoms: Market and legal overview



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# 1. Introduction

2016 will be a defining year in the Portuguese electronic communications market. A series of events the period 2013-2015 brought severe changes to the sector: structurally, there was a high number of concentrations, e.g. the creation of Nos from the merger of Zon and Optimus and the change of ownership of PT, Onitelem and Cabovisão. Commercially, we witnessed an increased bet in multiple play, the entrance of Vodafone in the fixed markets and investment by all major operators in new technological improvements and in cloud services. Performance of the sector in 2016 will determine the success of these developments. The Portuguese electronic communications regulator Autoridade Nacional de Comunicações (“ANACOM”) also endured statutory changes and more are envisaged, as it is being discussed whether it should merge with the contents regulator.

## 1.1. Market Statistics

According to Organisation for Economic Co-operation and Development statistics<sup>1</sup> Portugal is today ranked in the top 20 countries in the world with more use of fibre optic technologies.

ANACOM statistics<sup>2</sup> show that the liberalisation had a positive impact in the sector and on the economy in general, which continues to this day. At the end of the third quarter of 2015, there were 16.7 million active mobile stations associated with post-paid, pre-paid and hybrid tariff plans. In this quarter, the penetration rate is 161.4 users per 100 inhabitants of which 123.5 were considered active users.

The fixed internet access market (including FTTH, xDSL and cable) grew from just 0.6 million in 1999 to 3.07 million in the third quarter of 2015. The number of customers with fixed internet access increased by 2.3% when compared to the previous quarter and by 11% compared to the third quarter of 2014.

The penetration of NGN accesses, through the deployment of FTTH/B accesses, registered a growth of 7.1% when compared to the previous quarter and by 34.2% compared with the third quarter of 2014, reaching an aggregated number of 774,000 households. The number of accesses

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<sup>1</sup> Retrieved from <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm>

<sup>2</sup> Unless otherwise indicated all data refers to latest figures available in Q3, 2015.

in FTTH/B in the last three quarters presented the largest increase ever, with 50.000 new access in each quarter.

The number of effective mobile broadband users increased in 4.1% 5.5 million users in the third quarter of 2015. This represents a 22.6% increase regarding the effective users in the third quarter of 2014.

Regarding the subscriber television services market a wider range of technologies (mainly through FTTH and xDSL, but also DTH and BWA) are currently being offered by multiple providers in parallel to the traditional cablecast service. Thus, during the third quarter of 2015, the total number of television services subscribers increased to 3.47 million, 179.000 more than in the third quarter of 2014.

Multiple play packs are extensively used in Portugal, which accounts for growing penetration figures even during economic downturn cycles. There are currently 3.2 million bundled pack subscribers, with quintuple play packs already accounting for 37.4% (1.2 million subscribers) of bundled pack subscribers, representing an increase of 48.3% comparatively to the third quarter of 2014.

## 2. Market players

The Portuguese EC market is characterised by the existence of multiple players. Although there has been a relevant number of concentrations, especially among big players, there are several smaller and/or specialised companies providing networks and services. The four major players are identified below.



PT was the government company operating the whole telecommunications market and the incumbent operator in Portugal. It was privatised between 1995 and 2000. Since June 2015 it is part of the Altice Group, operating under the Meo brand in all markets, it provides a wide array of services such as fixed and mobile broadband services, fixed and mobile voice services, subscription TV service, VoD, cloud services, cloud gaming services and wireless internet hotspots;



A company which resulted from the merger of the ZON and Optimus in 2014, Nos provides services in all markets, including fixed and mobile broadband services, fixed and mobile voice services, subscription TV service, VoD, cloud and operates movie theatres;

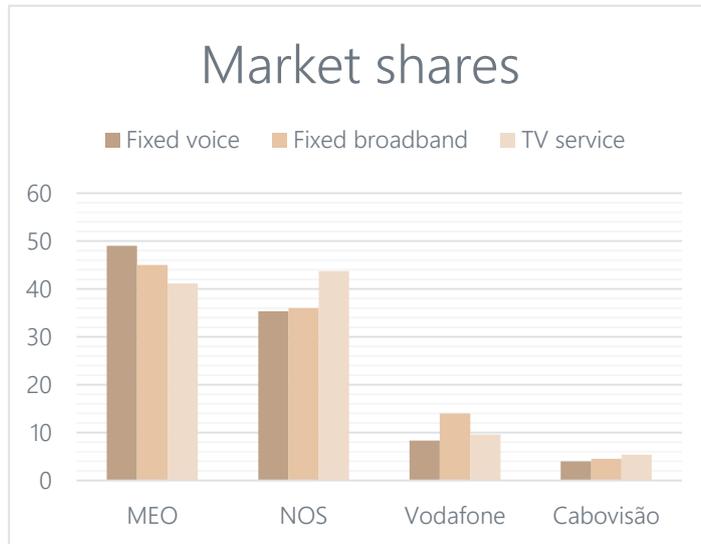


Vodafone Portugal was incorporated as Telecel in 1992, now a full subsidiary of the Vodafone Group. Presently it provides fixed and mobile broadband services, fixed and mobile voice services, subscription TV service, VoD and Cloud services; and



Having entered the market in 1993, Cabovisão has traditionally provided services in central and southern Portugal, including fixed voice and broadband services and subscription TV service. It underwent several ownership changes, it was held by Altice between 2011 and 2015 and is now held by the APAX Group.

The following chart presents their market shares in the fixed markets:



Other players include the following companies:



Onitelecom: The Company was incorporated in 2000 during the liberalisation of the Portuguese telecommunications market. It was acquired by Altice in 2013 and is now held by the APAX Group. This operator is specially focused in fixed internet and telephone and multiple cloud services to the business sector and to public entities;



AR Telecom operates since 2000. It withdrew from the residential markets and now provides solutions to professionals and to the public sector, including broadband, voice and multiple cloud services;



IP Telecom, previously Refer Telecom, is a telecommunications company specialised in services connected to the management of the Portuguese highway and railway infrastructure. It was created in 2015 by the merger between the Estradas de Portugal and REFER;



Uniteldata is a telecommunications company which provides the services of fixed voice, television and fixed broadband. It operates in areas with low population density;



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

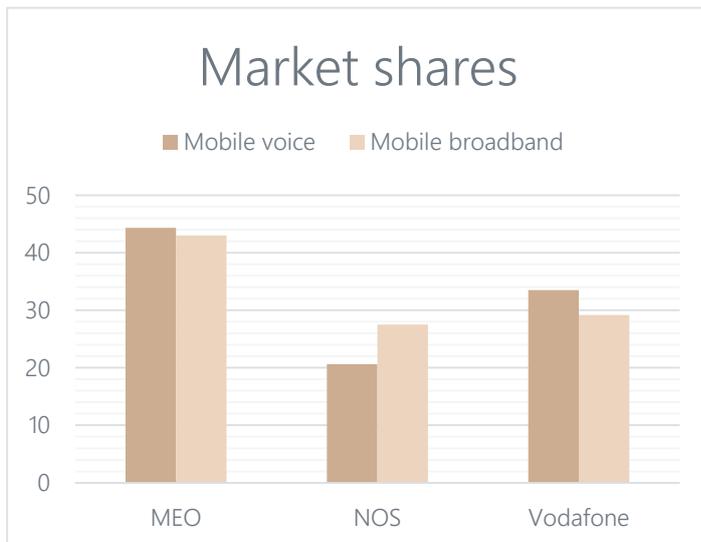


COLT Technology Services is a subsidiary of Colt Group. It supplies the following services: network, voice, IT services and datacenter; and



G9Telecom is a company which provides services mainly directed to business clients but also to final customers. It provides the following services: fixed broadband, fixed voice and mobile voice.

It comes as no surprise that in the mobile markets, the major operators are PT, Nos and Vodafone Portugal. The following chart presents their market shares in these markets:



Presently there are three mobile virtual network operators (“MVNO”) operating in Portugal:



Phone IX by CTT-Correios de Portugal S.A. CTT is a major company in the postal communications sector in Portugal, which was recently privatised. It is the provider of the universal postal service in Portugal and also provides financial services;



Lycamobile operates in Portugal since 2012. It is focused in offering competitive prices for international calls. The main target customers are immigrant communities; and



Vectone Mobile (formerly operating under the Mundio brand) entered the Portuguese market in 2012 providing low prices for international calls. The main target customers are also immigrant communities.

# 3. Legal framework

## 3.1. Regulations

### (1) Electronic communications

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. 2015/2120, of 25 November 2015, which approved the end of roaming charges within EU space by 15 July 2017.

### (2) Radio communications

Although the 2004 Communications Law revised most of the previous regulatory framework, wireless stations and networks are subject to specific regulation under the 2001 Radio Communications Law.

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 granting of permanent or temporary radio licences, and the definition of certain classes of services and stations that may require or may be exempt from the granting of a licence.

Under current regulations, wireless services may be divided and regulated into three main categories:

- (a) terrestrial mobile services such as cellular telephony (GSM/UMTS operators) and trunking, which are regulated by the 2004 Communications Law;
- (b) 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 (under the 2004 Communications Law); and

- (c) satellite services that are subject to radio electric licensing.

In 2010, as a result to the switch-off of analogue television broadcast and in preparation for 4G spectrum auctions undertaken in 2011, ANACOM published a relevant number of consultations on wireless issues, including the harmonization of licensing titles of existing mobile network operators ("MNO").

In 2015 ANACOM has launched a public consultation on the band 3.4 - 3.8 GHz, which is scarcely used due to its allocation to WiMAX and FWA, probably with a view of allowing its usage for high speed mobile broadband.

## 3.2. Market authorities

### (1) ANACOM

ANACOM is a public entity endowed with financial and administrative autonomy and with its own assets, with the general duties of regulating, supervising and representing the communications sector.

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

- (a) the promotion of effective competition on the provision of electronic communications network and service provision;
- (b) the deployment of the EU internal market by removing existing barriers on the provision of electronic communications network at the European level; and
- (c) consumer protection by ensuring access to the universal service, tariff transparency and protection against abusive legal terms and conditions imposed by operators, as well as protecting their privacy.

ANACOM is an independent body in the exercise of its duties, and it is neither subject to the policy guidelines set by the Government in respect of the communications sector, nor to supervision by the relevant Ministry regarding certain subjects, which would fall under the Government's administrative power.

### (2) 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.

At the central government level, a key role to consider is that of the Portuguese Competition Authority ("AdC"), an agency empowered to enforce antitrust law, which has a major role, for instance, on merger controls regarding telecommunications companies.

In October 2013 AdC created the Special Unit for Evaluation of Public Policies (*Conselho da Unidade Especial de Avaliação de Políticas Públicas – UEAP*), which has expressed concerns for the telecommunication sector.

Since its incorporation, in January 2003, AdC cleared several mergers and acquisitions (“M&A”) between telecommunications operators, most of which were successful, such as: (i) Vodafone and OniWay concerning the mobile market (Notification Procedure DOPC-Ccent. No.09/2003 of 21 March 2003); (ii) Novis Telecom and KPNQwest Portugal<sup>3</sup>, in the fixed voice and data market (Notification Procedure DOPC-Ccent. No.14/2004 of 21 June 2004); (iii) Riverside (private equity fund) and Onitelecom, regarding the fixed market (DOPC-Ccent. No.58/2006—Winreason (Riverside)/ONI); and (iv) Sonaecom (Optimus) and the PT Group, concerning all markets (this merger would ultimately fail). Most recently, the Competition Authority cleared the M&A operations between (v) the Altice Group and Cabovisão (a two-staged acquisition process comprising DOPC-Ccent No.37/2012, of 10 August 2012 and DOPC-Ccent No.11/2013, of 18 March 2013); (vi) Optimus and ZON Multimedia (DOPC-Ccent. No.5/2013, of 2 February 2013)<sup>4</sup>; and (vii) the Altice Group and Winreason (Onitelecom) (DOPC-Ccent. No.19/2013, of 3 June 2013). Other than AdC, the European Commission has cleared the acquisition of PT by the Altice Group (M.4799), conditional on Altice’s divestment in Onitelecom and Cabovisão, an operation which reshaped the Portuguese Electronic Communications market in 2015. These companies were reportedly sold by €150 million to Apax France.

Also, at the central administration level, the Portuguese Quality Institute (*Instituto Português da Qualidade*), which is the Portuguese standardisation organisation, 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 telecommunications equipment.

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<sup>3</sup> KPNQwest Portugal resulted from a spin off from the Portuguese branch of the Dutch-American operator occurring in 2002.

<sup>4</sup> This merger, the largest in the Portuguese market to date, concerned Optimus, a quadruple play operator with GSM/UMTS/LTE mobile licenses and ZON Multimedia, the leading Pay TV operator based on Eurodocsys 3.0 and fibre networks who used to operate an MVNO. This merger created the second largest integrated operator in Portugal, which is currently operating under the “NOS” brand.

### 3.3. Licensing procedures

#### (1) General Authorisation

Under the General Authorisation system, 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 authorisation undertakings are allowed to:

- (a) deploy their own networks and service facilities, using, if necessary, administrative privileges such as the right to expropriate land and create rights of way;
- (b) negotiate interconnection or obtain access to other providers services; and
- (c) 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. In particular, the concessionaire of the public telecommunications service, has a specific obligation to make available to other providers of public electronic communications access to ducts, poles and other owned or managed infrastructure or sites for the purpose of installing their own systems, equipment and other resources.

Along with the common set of generic rights, telecommunications undertakings may be assigned individual rights under the 2004 Communications Law. These rights refer to the allocation of either numbering resources or radio electric frequencies.

#### (2) Specific rights

Although the right to operate under a general authorisation is not subject to term, individual rights of use of spectrum and similar rights are granted for a 15-year period. Depending on the specific service and taking into account its intended purpose and the need to allow an adequate period to recoup the investment, the time periods may vary between 10 and 20 years. These rights are renewable for successive periods upon request by the licensee a year before the expiration of the licence.

### 3.4. Market regulation

#### (1) Market definition, significant market power and remedies

ANACOM may apply ex-ante regulatory remedies in non-competitive markets and solely to undertakings with significant market power ("SMP").

Under the 2004 Communications Law it is up to ANACOM to proceed to market definition, upon consultation with the service providers. ANACOM found out SMP in six major cases:

- (a) Imposition of obligations of narrowband retail markets;

- (b) Wholesale markets for call origination and termination in the public telephone network at a fixed location;
- (c) Unbundled access wholesale market and broadband access wholesale market;
- (d) Wholesale markets of voice calls on individual mobile networks;
- (e) Wholesale markets of leased lines; and
- (f) Broadcasting transmission services.

The initial findings mostly confirmed earlier decisions and unsurprisingly declared the incumbent as holding SMP on most markets. These findings were subsequently upheld by later analysis carried out in numerous occasions both by ANACOM and other regulatory entities, namely AdC (see above).

Market analysis undertaken after the 2007 review of the EU's Market Definition Recommendation were expected to give rise to significant changes in the way regulators view the market—though, the analysis carried out by ANACOM did not reflect any major impact. In 2014 however, after a public consultation, ANACOM: (i) revoked the obligations it imposed to operators in the retail markets of access to the public telephone network at a fixed location and markets of telephone services provided at a fixed location; and (ii) decided to maintain with some changes the obligations imposed to operators in the wholesale market of call origination at a fixed location.

## (2) Access and Interconnection

The legislation in force establishes the principle of freedom of negotiation of interconnection agreements between all undertakings, notwithstanding ANACOM's intervention powers.

As in the former regulatory framework, 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.

In addition, international carriers requiring access or interconnection are not required to apply for a general authorisation provided that they do not offer any electronic communications services in Portugal.

ANACOM may, in any event, impose access and interconnection obligations on all operators whenever it believes it to be suitable to promote competition and protect the customer, including the possibility to impose technical and operational interconnection requirements.

## (3) Operators with Significant Market Power

Operators deemed to have significant market power may be subject to additional obligations which include:

- (a) the provision of different reference offers, namely for interconnection and the unbundled local loop;
- (b) transparent billing, accounting separation and, in some cases, non-discrimination;

- (c) price control mechanisms, including cost accounting, retail price control and cost orientation;
- (d) granting access to specific network elements; and
- (e) the obligation for functional separation, by imposing to vertically integrated companies the obligation to place activities related to the wholesale provision of access products relevant to an independently operating business entity.

ANACOM has employed price control mechanisms throughout the years. In 2015, for instance, the regulator imposed a price drop in the wholesale call termination market, which is now at 0.83 euro cent per minute.

#### (4) Control Over Retail Markets

ANACOM has a special prerogative to impose price controls and special obligations over certain retail markets, including: (i) a minimum set of leased line services; and (ii) carrier pre selection.<sup>5</sup> However, ANACOM has consistently stated that the imposition of regulatory obligations is primarily targeted at wholesale markets.

### 3.5. 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.

Presently, the universal service obligation, as defined in the 2004 Communications Law, entails one or more of the following:

- (a) access to public fixed telephony services, including public payphones;
- (b) directory services;
- (c) special measures aimed at guaranteeing access to handicapped citizens; and
- (d) 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.

A 2012/2013 public tender to select the universal service obligation providers comprised the three aspects of the universal service. As a result thereof, NOS is now the provider of a connection to a

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<sup>5</sup> Regulation No.1/2006, of 9 January 2006, laid down new rules concerning CPS, namely by reducing service provision deadlines and entitling new possibilities in what concerns voice requests by the end-users.

public communications network at a fixed location and of a publicly available telephone service over that connection in Portugal. The provision of a public payphone service and of a directory service were awarded to the PT Group.

### 3.6. Universal Service Compensation Fund

The 2004 Communications Law also addresses the issue of the universal service funding. The Universal Service Compensation Fund mentioned in the 2004 Communications Law was set up in 2012. The purpose of the Fund is to finance the net costs arising out the provision of the telecommunications universal service. It is managed by ANACOM.

The contributions to the Fund mostly rise out of: (i) contributions from the companies that offer public communications networks that register a business volume equal to or higher than 1% of the total business volume of the electronic communications sector; (ii) the annual remuneration paid by the State for the provision of the universal service of providing a comprehensive directory and a comprehensive telephone directory enquiry service; and (iii) fines or default interest regarding the payment of the contributions.

### 3.7. Charges and penalties

#### (1) Charges

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

- (a) a fee to obtain declaration of the existence of individual rights;
- (b) an annual fee applicable to network operators and service providers;
- (c) a fee to ensure the right to use radio electric frequencies and numbering resources;
- (d) fees for installation of electronic communications infrastructures (ITUR/ITED); and
- (e) other charges, such as the contribution to the Universal Service Compensation Fund (see 7.1. above on “Universal Service Compensation Fund”).

Further to the Anacom charges, providers are required to pay taxes to municipalities for the use of public ways: the Municipal Fee for Rights of Way (*taxa municipal de direitos de passagem* — “TMDP”).

TMDP is charged 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.

TMDP is calculated based on a percentage set out by each municipality, on an annual basis, and capped at 0.25%, over the amount of telecommunications services invoiced in a given month (VAT excluded) by the providers to any end users located in the municipalities, where such installation, passage and crossing takes place.

Subscriber television service providers contribute to a fund for the financing of audiovisual and independent cinema works. This fee is complemented by a compulsory investment obligation pending on video-on-demand service providers ("VoD").

Under the Cinema Law, the operators' annual contribution is set at €1.75 per subscriber. ANACOM is responsible for paying from its net proceeds the same annual amount as the operators, that is to say an annual amount of €1.75 per total number of subscribers until and including 2019. From 2020 onwards, operators will be responsible for paying an annual amount of €2 per subscriber and ANACOM will pay 75% of that value, in an annual amount of €1.50 per total number of subscribers.

## (2) Penalties

The supervisory and regulatory powers introduced by the 2004 Communications Law were revised and reinforced in 2009 and in 2012, probably bearing in mind some recent cases where ANACOM's authority was openly challenged by providers.

Unlike before, when ANACOM could only impose relatively small fines or alternatively cancel the existing licences, usually a disproportionate measure, the national regulatory authority now has the possibility of using a wide range of tools, such as:

- (a) broad powers of investigation;
- (b) the use of precautionary and/or interim measures such as injunctive relief;
- (c) the amount of the applicable penalties raising from €45,000 to €5 million, that in some cases may be applicable per day;
- (d) confiscation of equipment; and
- (e) suspension for up to two years or even cancellation of authorisation.

ANACOM tends to favour other enforcement actions instead of applying fines, inclusively in more severe infringement cases. However, in 2014 ANACOM fines ascended to a total of € 7.9 million. The Competition, Regulation and Supervision Court hears appeals against penalties imposed by ANACOM.

## 4. Outlook

The Portuguese EC market is expecting changes as over the last few years there has been a discussion on whether to merge ANACOM and the media contents regulator *Entidade Reguladora para a Comunicação Social* ("ERC"). The Chair of ANACOM has also pointed out that having a role in content regulation would be important for electronic communications regulators. This merger of the regulators depends solely on political will, as there are no major legal obstacles to it.

EC service providers are also lobbying for some form of integration between content regulation and telecom regulation, further to, among others, some operators having achieved key transmission deals with major sports clubs. In effect, unlike in countries such as the UK, Portuguese football clubs are entering into individual long-term transmission deals with EC operators instead of collectively negotiating their transmission rights. The deals are currently being assessed by the AdC, which may void them if they are found to breach competition law.

Major and minor EC service providers are employing aggressive market strategies in obtaining new customers and are also increasing their bets in technology markets such as cloud storage and software solutions.

M&A operations within the sector are not over, as Cabovisão and Onitelecom, which were sold to Apax France, are likely to be integrated into other providers or to receiving investment from foreign players.

# Schedule I

Key Electronic Communications statutes and regulations.

- (a) Decree-Law No.39/2015, of 16 March 2015, which repealed Decree Law No.309/2001 of 7 December 2001 and established the new ANACOM statutes;
- (b) Law No.55/2012 of 6 September 2012, as amended by Law No.28/2014 of 9 May 2014, which defines a fee per Pay TV user to finance the production of cinema and audiovisual works. Its provisions are complemented by the mechanisms set out in Decree Law No.9/2013, of 24 January 2013, and by Law No.124/2013, of 30 August 2013;
- (c) Law No.35/2012 of 23 August 2012, which creates a compensation fund for the universal service;
- (d) Law No.51/2011, of 13 September 2011, implementing Directives 2009/136 and 2009/140 and extensively amending the 2004 Communication Law;
- (e) Decree Law No.123/2009 of 21 May 2009, as last amended by Law No.47/2013 of 10 July 2013, setting up rules on the access to infrastructure suitable for usage by telecom services (ITUR and ITED Regulations);
- (f) ANACOM Notice No.15252/2009, published on 31 August 2009, on radio electric licensing;
- (g) Law No.99/2009 of 4 September 2009, as amended by Law No.46/2011, of 24 July 2011, that approves the framework scheme of administrative offences within the communications sector;
- (h) Decree Law No.18/2008 of 29 January 2008 (as amended), which approves the Public Administrative Entities Procurement Code;
- (i) Administrative Rule No.1473-B/2008 of 17 December 2008, as last amended by Administrative Rule No.378-D/2013 of 17 December 2013, on fees due to ANACOM.
- (j) ANACOM Regulation No.58/2005 of 18 August 2005, as last amended by Regulation No.114/2012 of 13 March 2012, on number portability;
- (k) ANACOM Regulation No.46/2005 of 14 June 2005, (as amended) on service levels;
- (l) 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);
- (m) Law No.41/2004 of 18 August 2004, as amended by Law No.46/2012 of 29 August 2012, regulating the processing of personal data and the protection of privacy in the EC sector;
- (n) the 2004 Communications Law, as last amended by Decree-Law No.35/2014, of 7 March 2014;
- (o) Decree Law No.151-A/2000 of 20 July 2000, as amended, concerning infrastructure deployment and usage and spectrum usage regarding radio communications (the "2001 Radio Communications Law").

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