International
Comparative
Legal Guides

Practical cross-border insights into telecoms, media and internet law

Telecoms, Media & Internet 2022

15th Edition

Contributing Editor:
Emma Wright
Deloitte Legal

MEF
MOBILE ECOSYSTEM FORUM

ICLG.com

ISBN 978-1-83918-164-1
ISSN 2050-7607

Published by
global legal group
59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
www.iclg.com

Publisher
James Strode

Production Editor
Jane Simmons

Senior Editor
Sam Friend

Head of Production
Suzie Levy

Chief Media Officer
Fraser Allan

CEO
Jason Byles

Printed by
Ashford Colour Press Ltd.

Cover image
www.istockphoto.com

Strategic Partners

International Comparative Legal Guides

Telecoms, Media & Internet 2022

15th Edition

Contributing Editor:
Emma Wright
Deloitte Legal

Industry Chapter

Expert Analysis Chapters

Q&A Chapters

Portugal

PLMJ


Pedro Lomba


Nádia da Costa Ribeiro


Rita de Sousa Costa

1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

According to data provided by the association of telecoms operators in Portugal, the sector generates an annual revenue of EUR 5.3 billion, representing 2.3% of Portugal's GDP and 17,265 direct jobs.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction and any significant legislation on the horizon such as the regulation of online harms, regulation of social media or artificial intelligence (please list the draft legislation and policy papers).

(a) Telecoms
- DL 7/2004 of 7 January, as amended [E-commerce Law].
- Law 5/2004 of 10 February, as amended [Electronic Communications Law].
- Law 41/2004 of 18 August, as amended [E-privacy Law].
- Decree-Law 123/2009 of 21 May, as amended [Communications Infrastructures Law].
- Law 46/2018 [Portuguese Cybersecurity Law].

(b) Audio-visual
- Law 53/2005 of 8 November [Media Regulation Authority Act].
- Law 74/2020 of 19 November [AVMS Law].
- Law 78/2015 of 29 July [Media Transparency Law].

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; (b) audio-visual media distribution sectors; and (c) social media platforms in your jurisdiction.

(a) Telecoms
- ANACOM – National Authority for Communications.
- CNCS – National Cybersecurity Centre.
- APDC – Portuguese Association for Communications.
- APRITEL – Association of Telecoms Operators.

(b) Audio-visual and social media
- ERC – Media Regulation Authority.
- PMP – Platform for the Private Media.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment including in relation to the supply of telecoms equipment? Are there any upper limits?

Both sectors have been liberalised and are open to foreign investment. However, under Decree-Law 138/2014 of 15 September (the FDI Law), the Portuguese Government may exceptionally oppose investment by entities from outside the European Union, in certain regulated and sensitive sectors (those being defence, national security, energy, transport and communications).

The relevant assessment under the FDI Law is whether a transaction resulting directly or indirectly in the acquisition of (sole or joint) control, by an investor from a country outside the EU and the EEA, puts at risk, in a real and sufficiently serious way, defence and national security and/or the security of supply of services which are fundamental to the national interest.

The following criteria are taken into account in determining whether there is a real and sufficiently serious threat to defence and national security and/or the security of supply of services fundamental to the national interest:
- the physical security and integrity of strategic assets;
- the permanent availability and operability of strategic assets, and their capacity to fulfil their obligations in good time, in particular public services, under the terms of the law;
- the continuity, regularity and quality of services of general interest provided by people who control strategic assets; and
- the preservation of the confidentiality, imposed by law or public contract, of the data and information obtained in the course of the work of the people who control the strategic assets and the technology necessary to manage the strategic assets.

2 Telecoms

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Like all EU Member States, Portugal is a member of the World Trade Organisation. Further to the Uruguay Round Commitments that took place between 1994 and 1995, Portugal adopted and implemented the regulatory framework for the basic telecommunications services under the GATS.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The provision of electronic communications networks and services is regulated by several legislative acts and regulations, most of which incorporate directives approved at the EU level into Portuguese law. The main legislation is:

- Law 24/96 of 31 July, as amended;
- Law 5/2004 of 10 February, as amended;
- Decree-Law 123/2009 of 21 May, as amended;
- Decree-Law 134/2009 of 2 June;
- Law 7/2020, as amended; and
- Decree-Law 56-B/2021 of 7 July.

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government? Which regulator is responsible for social media platforms?

ANACOM (the National Communications Authority) is the sector-specific regulatory authority and the Portuguese Competition Authority supervises *ex post* market conditions in the electronic communications market. The regulation of social media platforms may fall under the supervision of the Portuguese Regulatory Authority for the Media (ERC – *Entidade Reguladora para a Comunicação Social*) whenever the platforms host or are used as broadcast media outlets or supervised by ANACOM regarding the provision of information society services. Finally, whenever the issue of privacy arises, social media platforms are supervised by the National Data Protection Commission (CNPD).

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions of the national regulatory authority may be appealed to a specialised court called the Antitrust, Regulation and Supervision Court.

2.5 What types of general and individual authorisations are used in your jurisdiction? Please highlight those telecom based authorisations needed for the installation and/or maintenance of infrastructure?

Portuguese regulations establish the general authorisation rules. Under these rules, companies that intend to provide electronic communications networks and services must, prior to the launch of the services, send to ANACOM a brief written description of the network or service they will offer and the date they plan to begin operations. In this respect, ANACOM has approved Regulation 6/2018 of 5 January regarding the registration of companies offering electronic communications networks and services. This Regulation specifies information duties on companies subject to the Regulation and approves the forms to be completed to notify ANACOM of the start of operations.

Under the general authorisation rules, any company can install telecoms infrastructure, although other specific licences may be required, such as administrative authorisations required by municipalities or specific professional requirements at the human resources level.

Individual licences are issued for the use of numbering and frequency resources.

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

Under the general authorisation rules, companies must provide ANACOM with the following information:

- A brief description of the network or service to be offered (indicating the type of network or service, market, support network of the service, information on the networks' properties and purpose, need for numbering or frequency and resources and specification of such resources, and a general description of the service offer).
- The date planned for the commencement of operations.
- Full identification of the company, including the permanent representation of the company in Portugal, and if applicable, case and contacts for communications.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

The use of numbering and frequency resources is subject to the issuance of individual rights of use.

Individual rights of use of numbering resources have no specific duration and they can be transferred under the terms and conditions to be defined by ANACOM, which must establish mechanisms to safeguard the effective and efficient use of the numbers and users' rights.

The law has no specific rules on change of control of the licensee. Nonetheless, in the past, whenever operators notified ANACOM of any change of control or company restructuring that involved the transfer of numbering resources from one company to another, ANACOM has launched public consultations and, in some instances, has determined that certain numbering resources of exceptional economic value (800, 808 and 707 numbers) be freed and returned to ANACOM to avoid the hoarding of these "golden numbers".

Individual frequency rights are granted for 15 years, but may be granted for a minimum of 10 or a maximum of 20 years, depending on the service and the purpose in question, and on the need to allow an adequate period to amortise the investment. These terms are renewable upon request of the holder of the rights of use, provided it files for the renewal one year before the end of the rights of use.

ANACOM may not restrict or revoke frequency rights before the end of the applicable period, except in properly justified circumstances.

These rights of use are transferrable or may be leased under the conditions in the right of use **and** the proceedings of the

Electronic Communications Law, whenever the transfer or lease is not expressly excluded by ANACOM (for the whole or part of the rights of use period) and published in the National Frequencies Allocation Plan (QNAF). ANACOM may not prohibit the transfer and lease of frequency rights of use granted in respect of bands for which the transfer and lease are established in execution measures approved for that purpose by the European Commission, under Directive 2002/21/EC, as amended by Directive 2009/140/EC of 25 November.

In the event of a change of control of the licensee that leads to an accumulation of frequency rights, ANACOM may adopt measures to ensure the removal of restrictions on services and technological neutrality and prevent distortions to competition. For that purpose, ANACOM can: (i) impose conditions underlying the right to use the frequencies, including determining a time limit for the effective use of the rights of use; (ii) determine for the holder in a specific case the transfer or lease of the rights of use; and (iii) limit the amount of spectrum to award to the same holder in proceedings for the grant of frequency rights of use.

2.8 Are there any particular licences or other requirements (for example, in relation to emergency services) in relation to VoIP services?

There are no specific licences for VoIP services. In 2006, ANACOM issued a decision on the regulatory framework applicable to VoIP services. Under this decision, VoIP service providers using National Numbering Plan (NNP) numbers must comply with the same obligations as a traditional telephone services provider.

Concerning access to emergency services, ANACOM considered that all VoIP service providers holding rights of use of numbers of the NNP, including numbers for the provision of nomadic VoIP services, should ensure within Portugal the forwarding of calls to the national emergency number, as well as information on the Calling Line Identification (CLI). In the event of restrictions in this respect, VoIP service providers must inform their customers about this prior to the execution of the services contract.

2.9 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Regarding rights of way, the Electronic Communications Act specifically provides that operators have the right to (i) request, under the applicable law, the expropriation and establishment of public easements, and (ii) use the public domain to implant, cross or roll-out necessary installation of systems, equipment, and other facilities.

Decree-Law 123/2009 extends these rights to the private domain held by public entities. It also clarifies that, in both cases, rights of way are granted under procedures defined by the bodies that manage the public and private domains held by entities from the public sector. It also provides that municipalities can charge operators municipal fees which have previously approved, by the end of December, for rights of way to be in effect for the following financial year. These fees may not be higher than 0.25%. Entities of the central public administration and Autonomous Regions are not allowed to charge any fees for granting rights of way.

As to access to private land, Decree-Law 123/2009 determines that, to install telecommunications infrastructure on plots of land, developments and sets of buildings (ITURs) and connect it to public electronic communications networks, landowners and any parties that hold property rights over the properties that are subject to planning procedures (plots of land and developments) must freely assign the ITURs to the municipalities. This is to allow electronic communications undertakings to access the infrastructure through a transparent, expedited, non-discriminatory and adequately publicised process.

ITURs in condominiums are jointly held by all owners and they can only oppose the installation of a telecommunications infrastructure for individual use by any owner, tenant, or legal occupier if (i) they install a telecommunications infrastructure for collective use that ensures the same services using the same technology within 60 days after being notified by the owner, tenant, or legal occupier that intended to install the infrastructure, or (ii) the condominium already has a telecommunications infrastructure for collective use that ensures the same services using the same technology.

2.10 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The Electronic Communications Law stipulates that wholesale interconnection may be imposed upon any undertaking, regardless of it having significant market power: (i) that controls access to end-users, to the extent necessary to ensure end-to-end communications including, when justifiable, the obligation to interconnect their networks; (ii) whenever the undertaking controls access to end-users and it is justified and to the extent necessary to ensure service interoperability; and (iii) to determine access to APIs (application programme interface) and EPGs (electronic programme guides) under fair, reasonable and non-discriminatory conditions, to the extent necessary to ensure end-users' accessibility to digital television and radio broadcast services that are specified by the authorities.

2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

Operators declared as having significant market power are required to publish information concerning their access and interconnection offers.

2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

In September 2018, ANACOM decided that all operators providing call termination services on individual public telephone networks provided at a fixed location (Market 1) have significant market power. Further to this finding, ANACOM determined, regarding calls originated in the European Economic Area (EEA) or calls terminated by operators that terminate national traffic charging termination tariffs equal to or lower than regulated prices charged by operators present in the Portuguese market for traffic originated in the EEA, that Significant Market Power (SMP) operators are subject to establishing cost-oriented prices according to an efficient operator criterion and based on a pure long run incremental cost (LRIC) model. In addition, ANACOM determined that interconnection prices and conditions should be established according to certain criteria (price caps for 2019 and 2020 to be updated according to inflation data and based on a pure LRIC model).

In 2016, ANACOM determined that mobile operators with SMP in the market concerning wholesale voice call termination on individual mobile networks (Market 2) should all establish identical mobile termination rates regardless of: (i) where the call originates; (ii) the operator delivering the call to the SMP operator; and (iii) the purchasers of the service. ANACOM has also imposed a price control obligation based on cost-oriented prices determined on a pure BU (bottom-up) LRIC model.

ANACOM also determined that MEO (a Portuguese telecoms company) should be subject to a price control obligation regarding activities carried out in the market for wholesale local access at a fixed location. MEO was required to charge cost-oriented prices within its reference offers for access to ducts, poles, local loop unbundling and access to dark fibre, and in the market for wholesale central access provided at a fixed location for mass-market products (Markets 3a and 3b). Regarding these two markets, MEO must also ensure that products and services used internally use internal cost-oriented transfer prices.

To conclude, in respect of Market 4 (wholesale high-quality access provided at a fixed location) ANACOM determined that, as an operator with SMP, MEO must establish cost-oriented prices in respect of (i) high-quality access in non-competitive areas (within its Reference Offer for Ethernet Circuits – ORCE), (ii) transit segments in non-competitive routes, and (iii) circuits connecting the mainland to the Azores and Madeira islands – CAM Circuits – by amending the ORCE, establishing new prices for Ethernet CAM circuits and non-secured inter-islands circuits for access to international undersea cables and reducing prices of traditional CAM circuits up to 2 Mbps by at least 66%. MEO must also provide ANACOM, on a yearly basis, with data on the capacity contracted by operators and capacity used and reserved by MEO, and on the total costs, including O&M and CAPEX made in the previous year and planned for the following year, for purposes of the annual revision of CAM and inter-islands circuits.

2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Operators with SMP in wholesale access and interconnection markets are subject to accounting separation and the operator currently subject to this is: MEO (Markets 3a – wholesale local access provided at a fixed lo long run incremental cost (LRIC) cation and Market 3b – wholesale central access provided at a fixed location for mass-market products). In Market 4, MEO must implement a costing system and accounting separation.

To date, ANACOM has not imposed functional separation and the Portuguese Electronic Communications Law does not provide for the possibility of legal separation.

2.14 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

The regulations on high-speed broadband networks are principally contained in Decree-Law 123/2009, which sets out rules on the installation of infrastructure suitable for the accommodation and roll-out of electronic communications networks, and installation of telecommunications infrastructures in housing developments, urban settlements and sets of buildings.

This law applies to passive infrastructure, such as ducts, poles, manholes, street cabinets, and telecommunications inbuilding wiring, etc.

This law applies to:

- the State, the Autonomous Regions and local authorities;
- entities under the authority or supervision of bodies of the State, Autonomous Regions and local authorities, performing administrative tasks, regardless of their entrepreneurial nature, and to public companies and concessionaries, particularly those related to infrastructures for roads, railways, ports, airports, water supply, sewerage, and transport and distribution of gas and electricity;
- other bodies that own or operate infrastructures that are part of the public domain of the State, Autonomous Regions and local authorities; and
- electronic communications companies and entities in possession of infrastructure suitable for accommodating electronic communications networks for use by those companies when carrying out their activities.

Under Decree-Law 123/2009, electronic communications networks operators are given incentives to allow access to their infrastructure (cost sharing of the investments made) and to seek access from entities that own or manage infrastructure capable of accommodating electronic communications networks.

Fees for access and use of the infrastructure must be cost-oriented, considering the costs arising from the construction, maintenance, repair, and improvement of the infrastructure.

2.15 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Retail price controls are imposed on mobile operators under the EU Roaming Regulation.

ANACOM has also imposed price caps on retail prices for calls terminated in numbers of the 707 and 708 (universal access services), 760 (value-added services) and 808 and 809 (call services with shared costs) numbering ranges.

2.16 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

The Electronic Communications Law defines universal service as the provision of a minimum set of services available to all end-users, regardless of their geographical location and at an affordable/accessible price and with a specified quality. The universal service comprises the following services: access to a public communications network at a fixed location and provision of a publicly available telephone service as part of that access; making available a complete telephone directory and a complete directory information service; and the offer of a proper public payphone.

More recently, the Government enacted Decree Law 66/2021 to implement a social tariff for broadband internet access (over fixed or mobile networks) to benefit consumers with lower incomes or special social needs. Under this, ANACOM approved decisions on the social tariff to provide broadband internet access services, which is considered part of the universal service policy.

Universal service obligations mainly concern the availability of specific offers to end-users with disabilities, similar to those made available to other end-users, including access to emergency services and directory information services, quality of service, prices and expenditure control by end-users.

2.17 How are telephone numbers and network identifying codes allocated and by whom?

Telephone numbers and network identifying codes are allocated by ANACOM.

Under the Electronic Communications Law, rights of use of numbering resources must be allocated by open, objective, transparent, non-discriminatory, and proportional processes, at the request of companies offering electronic communications networks or services, or companies using those networks or services.

Further to a public consultation, ANACOM may decide to award rights of use of numbering with exceptional economic value by tender or beauty contest, including public tenders and auctions.

2.18 Are there any special rules which govern the use of telephone numbers?

The use of telephone numbers is governed by the Electronic Communications Law, the NNP and by ANACOM's decision of 2 June 1999 on the criteria and principles for the management and assignment of numbering resources.

ANACOM also approved specific regulations and decisions on the use of specific numbering ranges:

- Regulation 169/2013 of 13 May on the use of 18xy numbers.
- Decision of 19 November 2010 – ANACOM approved a specific numbering range (703) to provide electronic communications services in private networks not publicly available.
- Decision of 5 September 2007 – approving the numbering range 166 to provide harmonised services of social value under Decision 2007/116/EC of 15 February 2007.
- Decision of 12 July 2007 – ANACOM approved a new numbering range (92) for mobile virtual network operators to provide mobile terrestrial services.
- Decision of 4 April 2007 – on the numbering codes 761 and 762 to provide value-added services and price caps per call, and on the conditions to award rights of use of these numbering codes.
- Decision of 23 February 2007 – ANACOM determined the opening of the numbering range "30" to accommodate nomadic VoIP services.
- Decision of 25 February 2005 – establishing a new numbering range within the NNP ("71") to accommodate the provision of utility services at an increased tariff rate.

ANACOM's decision on the criteria and principles to manage and assign numbering resources contains the procedures applicable to companies providing electronic communications networks and services, services suppliers and end-users regarding administration and use of numbering resources. Under these principles, ANACOM does the primary assignment and it can recover the resources whenever they are not used in accordance with the conditions in the rights of use document, if there is a low level of usage of the resources or they are not used in an efficient or effective manner, if the NNP is amended or for reasons of national security.

The assignees may, in turn, go ahead with the secondary assignment of numbering resources, provided they do so in accordance with the NNP and comply with the principles of equity and transparency. A secondary assignment does not imply transfer of ownership, but only a mere right of use.

2.19 Are there any special rules relating to dynamic calling line identification presentation?

In 2008, ANACOM issued a clarification stating that Calling Line Identification Presentation should unequivocally identify the access of the call's originator (network termination point or applicational instance – e.g. VoIP). It also made it clear that the operator/service provider has to validate this information when provided by the user. This information is used to establish calls to emergency services and to identify and locate the origin of the call, so it should be trustworthy and allow for a call back to the location, terminal or origin.

Therefore, ANACOM considers that the access information must be consistent in any information relating to other supplementary services and that manipulation of the parameters of identification of the call's origin should conform to the international recommendations and standards.

2.20 Are there any obligations requiring number portability?

Yes. Under the existing framework, all subscribers assigned with numbers on the NNP have the right to request number portability (fixed, mobile, or nomadic numbers), and operators are obligated to implement number portability within the shortest period possible (one business day following execution of the agreement for transfer of the number).

Operators are also obligated to provide adequate and transparent information to subscribers regarding prices applicable to portability and calls to ported numbers.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Spectrum is managed and regulated by ANACOM.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

Use of spectrum is usually subject to specific licensing by means of issuance of frequency rights of use.

Individual rights of use of frequencies are granted for a 15-year period, but they may be granted for a minimum of 10 or a maximum of 20 years, depending on the service and considering the purpose and the need to allow for an adequate period to amortise the investment. These terms are renewable upon request of the rights holder, provided it applies for the renewal one year before the end of the rights of use.

ANACOM may not restrict or revoke frequency rights of use before the end of the applicable period, except in properly justified circumstances.

Frequency rights of use may be granted to companies providing electronic communications networks or services, or to companies using those networks. This is done using an open, objective, transparent, proportional, non-discriminatory process, and provided that technological and services neutrality in the management of spectrum is ensured, save when there is the need to establish restrictions provided for in Article 16-A of the Electronic Communications Law and published in the QNAF.

The law can also establish specific criteria and processes to grant rights of use of frequencies to television and radio broadcast operators, and to television distribution operators, to achieve goals of public interest. In this case, ANACOM can determine exceptions to the requirement of open proceedings.

The allocation of rights of use may take place under a full access regime or be subject to comparative or competitive beauty contests (auctions or tenders).

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions? Are there penalties for the unauthorised use of spectrum? If so, what are they?

When the use of spectrum does not cause harmful interference, there is no requirement to ensure the technical quality of a service, or there is no need to safeguard the efficient use of spectrum, or the latter is not necessary to fulfil objectives of general interest, the use is not subject to the allocation of rights of use.

In addition, when the use of frequencies has been harmonised at the EU level and, in that context, the conditions and processes for access to spectrum have been agreed upon and the entities to which the frequencies will be allocated have been chosen, in accordance with international agreements and EU rules, ANACOM must allocate the rights of use of those frequencies. Moreover, it may not impose any other conditions, additional criteria or proceedings that restrict, amend or delay the correct implementation of those frequencies in a common selection process.

Lastly, if ANACOM finds that the grounds used to allocate a certain frequency by means of a right of use cease to be justifiable, it must, further to a request from an interested party, adopt the measures necessary to revoke the right of use, in which case the use of the frequencies will be subject to the general authorisation rules.

The unauthorised use of spectrum constitutes a serious administrative offence, sanctioned with a fine of: €750 to €20,000 (natural persons); €2,000 to €50,000 (micro companies); €6,000 to €150,000 (small enterprises); €10,000 to €450,000 (medium-sized enterprises); and €20,000 to €5,000,000 (large enterprises).

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Administrative Rule 1473-B/2008 of 17 December determines the fees for allocation of rights of use of frequencies and the use of radio frequency spectrum.

Regarding the allocation of frequencies subject to the allocation of rights of use under the QNAF, when the requesting party does not hold any frequencies, it will benefit from a 50% reduction in the amount of the fees due for use of the spectrum during the first three years as of the issuance of the rights of use. Entities which, at the time of allocation, have held an amount of spectrum exceeding 60 MHz, will not benefit from this reduction.

To issue the declaration of rights of use, an administrative fee of €700 is due, and if endorsements are necessary, there is an additional fee of €70.

Focusing on the fees for the main services, whenever rights of use are granted under a competitive or comparative selection process, in a full access regime launched by a third party, the fees are:

- Allocation by auction or competition – to be determined before the tender or auction.
- Allocation in full access regime – €1,000.
- Allocation following selection procedures launched by a third party – €500.

The fees due for the use of frequencies are the following:

- Terrestrial electronic communications services – €60,000/1 MHz.
- Mobile services (with shared resources and land mobile services) – €60,000/1 MHz.
- Land mobile service – Railway communications system (GSM-R) $T = A/S * Fr$

  Where:

  A is the service area, in square kilometres, calculated according to the following formula:

  $A = L*10$

  L is the length, in kilometres, of the national railway network, currently with 2,600 km.

  10 stands for the reference value, in kilometres, assumed to be the width of the corridor the railway.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

If a change of control of the licensee leads to an accumulation (hoarding) of frequency rights, ANACOM can ensure the removal of restrictions on services and technological neutrality and prevent distortions to competition. To do this, ANACOM can: (i) impose conditions underlying the right to use the frequencies, including a time limit for the effective use of the rights of use; (ii) require the holder in a specific case to transfer or lease the rights of use; and (iii) limit the amount of spectrum to award to the same holder in the process to grant frequency rights of use.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Frequency rights of use are transferrable or may be leased under the conditions set out in the right of use and the proceedings under the Electronic Communications Law, whenever the transfer or lease is not expressly excluded by ANACOM (for the whole or part of the period of the rights of use) and published in the QNAF. ANACOM may not prevent the transfer and lease of frequency rights of use granted in respect of bands for which the transfer and lease are set in execution measures approved for that purpose by the European Commission, under Directive 2002/21/EC, as amended by Directive 2009/140/EC of 25 November.

To assign or lease spectrum rights of use, interested parties must notify ANACOM of their intention and of the conditions under which the assignment of lease will occur. Following this notification, ANACOM divulges said fact publicly and must ensure that the planned operation will not cause distortions to competition, specifically accumulation of rights of use, that frequencies are used in an effective and efficient manner, that the use for which the frequencies were allocated is observed whenever there has been a harmonisation under EU rules and that restrictions laid out in legislative acts concerning broadcasting are safeguarded.

If ANACOM plans to impose conditions regarding the transfer or lease, it must request the Competition Authority's opinion.

If ANACOM does not issue its position within 45 days of notification of the intended transfer or lease, its silence will be deemed as non-opposition to the operation going forward, but this does not relieve relevant parties of the obligation to notify ANACOM of the conclusion of the operation.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity. Are there any specific requirements in relation to telecoms operators?

The Portuguese cybersecurity rules are set out in different pieces of legislation.

The main cybersecurity legislation is the result of the implementation of the NIS Directive (2016/1148). These are Law 46/2018 of 13 August and Law 65/2021 of 30 July. The authority that oversees compliance with the NIS framework in Portugal is the CNCS. At the EU level, there is also Regulation (EU) 2019/881 on ENISA and on information and communications technology cybersecurity certification. Finally, Law 62/2011 of 9 May establishes the national critical infrastructures framework.

Another important piece of legislation is the data protection framework, notably the GDPR. Article 32 of the GDPR sets out security requirements that data controllers have to comply with, where applicable. Law 58/2019 of 8 August ensures the implementation of certain aspects of the GDPR in Portugal, but it does not comprise specific rules in addition to the GDPR when it comes to cybersecurity. Nonetheless, Resolution of the Council of Ministers 41/2018 of 28 March establishes the minimum technical requirements of networks and information systems that are required or recommended for all services and entities of the public administration. The CNPD is the Portuguese National Data Protection.

Furthermore, the law establishes specific requirements for telecom operators. Those are described in the Electronic Communications Law, the e-Privacy implementing law (Law 41/2004 of 18 August), Regulation (EU) 611/2013, and ANACOM's Regulation 303/2019. ANACOM is the National Regulatory Authority (i.e., the national electronic communications authority).

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The Portuguese Criminal Procedure Code establishes the rules under which law enforcement authorities can lawfully access private communications. Lawful interception of communications (i.e., wiretapping) can only take place under specific circumstances, and only if a person is suspected of having committed certain types of crimes. Interceptions must be proportional (if they are key to the investigation – if it would otherwise be very difficult to gather the evidence) and issued by a reasonable and grounded order of the court (*Juiz de Instrução*), following a request from the Public Prosecutor (*Ministério Público*). Interception of communications is authorised for a three-month period, renewable for periods subject to the same limit, provided they meet the applicable legal requirements.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Telecom operators are required to allow the judicial authorities to intercept communications that originated or are serviced in their networks. Furthermore, Article 27(1)(o) of the Electronic Communications Law provides for the installation and the provision of lawful interception systems to national authorities at the undertakings' own expense, and the provision of means of decryption (where they offer such facilities) in accordance with applicable legislation on the protection of personal data. The interception requirements may apply to any possible way of communications (e.g., traditional telephone calls, VoIP, SIP Trunking, etc.). Interception must be ordered by a reasoned order issued by a court in accordance with the requirements of the Portuguese Criminal Procedure Code.

4.4 How does the state intercept communications for a particular individual?

Telecom operators are required to ensure the confidentiality of communications and the related traffic data. In particular, persons other than users are prohibited from listening to, tapping, storing or intercepting communications and the related traffic data, without the consent of the users concerned, except when legally authorised to do so (Article 4 of Law 41/2004 of 18 August and Article 35 of the Portuguese Constitution). That being said, communications can only be intercepted under the rules of the Portuguese Criminal Procedure Code.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

There are no specific rules regarding the use of encryption other than the general technical measures provided for in Article 32 of the GDPR. There is also no specific requirement regarding the need to provide encryption keys to the state.

4.6 Are there any specific cybersecurity requirements on telecoms or cloud providers? (If so, please list the relevant legislation.)

Telecom operators must take appropriate technical and organisational measures to safeguard the security of their services with respect to network security.

ANACOM's Regulation 303/2019 on electronic communication networks and services security and integrity establishes that the technical and organisational measures should be based on several standards such as the ISO 2700X family requirements, ISO 22301, as well as the applicable ENISA and European Commission guidance.

Furthermore, several notification obligations are imposed on telecom operators based on different legal frameworks, such as: (i) the telecommunications framework (Article 58-B of the Electronic Communications Law sets out an obligation to notify the ANACOM of security breaches or loss of integrity that have a significant impact on the operation of networks and services. A description of these circumstances may be found in Article 21 of ANACOM's Regulation 303/2019 on electronic communication networks and services' security and integrity); and (ii) the e-Privacy framework (Article 3-A(1) of Law 41/2004 of 18 August sets out a general obligation to notify the CNPD in case of a data breach. Under Article 2(2) of Regulation (EU) 611/2013, telecom operators must notify the CNPD within 24 hours. Moreover, Article 3-A(2) of Law 41/2004 of 18 August imposes a general obligation on telecom operators to notify without undue delay the subscribers or users concerned when the data breach may negatively affect them. The same obligation is imposed by Article 3 of Regulation ((EU) 611/2013).

When it comes to cloud providers (as well as any other data controller under the GDPR), Article 33 of the GDPR provides for an obligation to notify the CNPD within 72 hours should a data breach occur. Article 34 of the GDPR sets out an obligation to notify data subjects when the breach is likely to result in a high risk for their rights and freedoms.

Finally, there is also the cybersecurity NIS framework. Under the NIS Directive implementing acts, the public authorities, critical infrastructure operators, operators of essential services and digital service providers must notify the CNCS of the occurrence of incidents with a relevant or substantial impact under Law 46/2018 of 13 August and Law 65/2021 of 30 July. The entities not covered by this mandatory notification scheme may voluntarily notify the CNCS under Article 20 of Law 46/2018 of 13 August 2018. Should such entities decide to voluntarily notify the CNCS, no additional obligations as a result of that notification can be imposed.

4.7 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Law 32/2008 of 17 July, which implemented the Data Retention Directive (2006/24/EC), sets out a legal framework for the retention of communications data for investigation, detection and prosecution of certain criminal offences. Data that telecom operators are obliged to retain includes traffic data or location data and the related data necessary to identify the subscriber or user. It turns out that the CJEU invalidated the Data Retention Directive (C-293/12, *Digital Rights Ireland*) and held later that those legal arguments that apply to the national acts that implemented the Data Retention Directive were invalid (C-203/15, *Tele2 Sverige*). Despite the CJEU case law, Law 32/2008 remains formally in effect in Portugal. However, following the above CJEU case law, the CNPD (the authority responsible for overseeing compliance with that Law) issued Resolution 1008/2017, which followed the complaints brought by the Public Prosecutor for breach of Law 32/2008 by telecom operators that did not comply with the Law's retention obligation. The CNPD decided, in accordance with the principle of the primacy of EU law, not to enforce Law 32/2008. Furthermore, recently the Ombudsman has submitted Law 32/2008 to the judicial review of the Constitutional Court and a decision is expected soon. In conclusion, although the Law has not *technically* been repealed, the CNPD will not enforce it against the telecom operators.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

In line with the European media law framework, audio-visual services may be provided by: (a) television services broadcasters; (b) providers of on-demand audio-visual services; and (c) video-sharing platform services made available by video-sharing platform providers. Operators may be subject to the jurisdiction of the Portuguese state, or operate according to the country-of-origin principle.

The operators, when subject to the jurisdiction of the Portuguese State, are regulated by the Portuguese Media Regulation Authority (*Entidade Reguladora para a Comunicação Social* – ERC).

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

All audio-visual media services are subject to common content regulation rules, including the obligation to respect human dignity, the rights of children and young people and the fundamental rights of citizens. In particular, audio-visual media services may not: (a) incite violence or hatred against groups of persons or members of such groups on grounds of sex, race, colour or ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, wealth, disability, age, sexual orientation or nationality; and (b) publicly inciting the commission of terrorist offences under Law 52/2003 of 22 August.

Television broadcasters are subject to specific time and manner restrictions regarding any programmes likely to have a negative influence on the formation of personality of children and adolescents. The broadcasting of such content must be accompanied by an appropriate visual identifier and may only take place between 10pm and 6am.

On-demand audio-visual services that may have a negative influence on the formation of the personality of children and young people may only be made available with the permanent presentation of a visual identifier and the adoption of technical functionalities that allow those who are responsible for exercising parental responsibilities, if they so wish, to block the access of children and young people to such content.

In terms of advertising, television advertising and teleshopping broadcast during the period between 6am and 6pm, and during the period between 6pm and midnight, may not exceed 10% or 20%, depending on whether it relates to, respectively, conditional access television programme services or free or conditional access television programme services with subscription.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

Under Article 13 of the Audio-visual Media Services Law, television activity is subject to licensing, through public tender, opened by decision of the Government, when it uses the terrestrial radio spectrum intended for broadcasting, under the terms established in the National Frequency Allocation Framework and consists of: (a) the organisation of unconditional access television programme services; and (b) the selection and aggregation of television programme services of conditional access or non-conditional access with subscription.

When the television activity consists in the organisation of television programme services that: (a) do not use the terrestrial radio spectrum intended for broadcasting, under the terms set out in the National Frequency Allocation Framework; and (b) are intended to be included in the offer of a distribution operator previously licensed for the television activity, it is subject to authorisation, at the request of interested parties.

The Media Regulatory Authority is responsible for granting, renewing, amending or revoking licences and authorisations for television activities.

On-demand audio-visual service providers must notify the Media Regulatory Authority electronically of the start and end of the activity of each of their services.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences are not assignable. They are considered non-transferable under the Audio-Visual Services Law. Changes of control of the licensee are subject to transparency and notification requirements under the Media Transparency Law.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

General rules laid down in Directive 2000/31 of 8 June 2000 (the E-Commerce Directive), as transposed by Decree-Law no. 7/2004, of 7 January (the Electronic Commerce Law), apply to the liability of intermediary service providers.

Four different categories of intermediary service providers and liability exemption conditions are set out in the Electronic Commerce Law. All of them vary according to their role in providing the content offered online: (i) **Transmission/Conduit** – operators that provide access to the Internet (usually for a subscription) and send and receive signals from other companies without intervening in that content; (ii) **Caching** – operators responsible for making temporary local copies for the sole purpose of making Internet traffic more efficient; (iii) **Hosting** – operators that keep and/or manage websites for end-users on a server without any editorial content intervention; and (iv) **Association Services** – operators that provide access to content by means of hyperlinks or search engines.

With regard to general rules on intermediary liability, providers are required to comply with the following ordinary duties: (i) inform the competent authorities immediately when they become aware of illegal activities taking place through the services they provide; (ii) satisfy requests to identify the recipients of services with whom they have storage agreements; and (iii) comply promptly with the determinations aimed at preventing or terminating an infringement, namely, to remove or disable access to information and to provide lists of the owners of the sites they host, when requested (and applicable).

As regards liability exemptions:

- **Caching Operators**. Exemption is granted where the intermediary provider of network communication services: (i) has no involvement in the content of the transmitted messages or in the selection of the messages or the recipients; and (ii) respects the conditions of access to the information.
- **Transmission/Conduit**. Passive intermediaries who have not produced the information or chosen the intended recipient, and act only as a mere transmitter of the communication, will not be liable where they: (i) do not initiate the transmission; (ii) do not select the receiver; and (iii) do not select or modify the transmission in transit.
- **Hosting and Association Services**. Exemption is granted for the information stored if: (i) it does not have actual knowledge of illegal activity or information; (ii) as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; and (iii) having obtained knowledge or awareness of the illegality, acted quickly to remove or disable access to information.

Only just recently have the Portuguese courts expressed their views on the concept of intermediary service provider and liability exemptions. In the Supreme Court of Justice's judgment of 10 December 2020, where the liability exemptions of caching and hosting operators were examined in detail, the court did not hold a Spanish web hosting company liable for the use, on a website it owns, of the distinctive signs owned by the claimant without the necessary legal authorisations. The court added that the web hosting company would only be liable if it had in some way participated or interfered with the content of the information transmitted or stored which, in the court's opinion, was not proven.

This decision has, however, been criticised for not having taken into account the Court of Justice of the European Union's case law in which the concept of awareness was previously analysed (Judgment of the Court (Grand Chamber), 12 July 2011, Case C-324/09).

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Under the current e-commerce legal framework, telecom operators and/or intermediaries, albeit not subject to monitoring obligations, must, immediately upon becoming aware of it, inform the public authorities of the detection of content made available through the services they provide whenever the availability of, or access to, such content may constitute a crime of child pornography or a crime of discrimination and incitement to hatred and violence.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

Portuguese law does not provide for any dedicated net neutrality requirements.

The principles of limited net neutrality set out in Regulation (EU) 2015/2120 of 25 November 2015, laying down measures concerning open internet access (the "Connected Continent Regulation") apply.

Under the Connected Continent Regulation, Internet Services Providers (ISPs) must treat all traffic equally, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.

However, net neutrality suffers limitations. ISPs may block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof: (i) where it is necessary to ensure compliance with national or European Union legislation on the legality of content under criminal law, or with measures to enforce such legislation; (ii) in cases of preservation of network security and integrity; or (iii) in situations where it proves necessary to minimise network congestion, which must be temporary or exceptional.

On 6 June 2016, BEREC published its draft Guidelines on the Implementation of European Net Neutrality Rules by National Regulators (including the Portuguese regulator ANACOM). Interpreting Article 3 of the Connected Continent Regulation, the BEREC Guidelines point out that operators are allowed

to offer free access to applications (e.g., a streaming service) as long as this is not subject to preferential traffic. The Guidelines point out that specialised services can only be offered if regular services are in no way affected and not as a higher-price alternative to otherwise degraded basic services.

As with zero-rating offers, BEREC points out that, while they are not generally prohibited, any blocking or slowing down of all applications except the zero-rated ones once the data cap is reached would be illegal.

On the matter of zero-rating offers, ANACOM further assessed the BEREC Guidelines, ruling in July 2018 that a number of zero-rating and similar offers made available by ISP's were in breach of the applicable European standards. At the basis of ANACOM's decision were the following irregular practices: (i) differentiated traffic management practices for general caps and specific caps or for applications without data consumption limits; and (ii) impossibility of some specific data caps being used in the EEA under the same conditions as in Portugal (non-compliant with the 'roam like at home' principle).

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

The basic framework for all categories of platforms and types of content is provided by the E-Commerce Directive and Electronic Commerce Law. For the time being, consumer VPN services are not subject to dedicated requirements under Portuguese law.

Telecommunications operators and/or ISPs (network operators) must block access to certain websites or content under specific circumstances that involve unlawful content or information. Where network operators are clearly aware of illegal activity or information associated or where the illegal nature is clear and manifest, they are required to inform the authorities immediately and to remove or make it impossible to access that information.

At the EU level, rules for two specific types of content strengthen the above rules. These relate to: (i) the Child Sexual Abuse and Exploitation Directive which requires Member States to take removing and blocking measures against websites that contain or disseminate child sexual abuse material; and (ii) the Counter-Terrorism Directive requiring the removal and/or blocking of websites containing or disseminating terrorist content.

6.5 Is there any regulation applicable to companies that act as intermediaries in their role of connecting consumers with goods, services, content, or are there any proposals for such regulation?

Besides the ordinary duties in the Electronic Commerce Law, the Portuguese legislature has recently enacted landmark rules applicable to online marketplace providers, setting out their joint and several liability for lack of conformity of goods, content or digital services made available through professional users under certain circumstances.

The new rules on online marketplace providers appear in the recently enacted Decree-Law 84/2021 of 18 October, which implements Directives 2019/771 and 2019/770. Upon implementing these Directives, the Portuguese legislature did not go beyond the required harmonisation.

From 1 January 2022, the liability of the online marketplace provider will depend on the role and level of influence they play in contracts concluded between professional users and consumers. Online marketplace providers will be jointly and severally liable with professional users whenever the following circumstances are met:

(i) the contract is executed, or payment is made exclusively through means made available by them;
(ii) the terms of the contract with the consumer are essentially determined by them; or
(iii) advertising is focused on them, and not on professional users.

Whenever online marketplace providers do not meet the circumstances outlined above, special duties to inform consumers via the platform are nonetheless established by this Decree-Law.

Considering the impact of this legislative innovation on the legal agenda of the collaborative economy, news of how the courts will be able to apply and interpret this set of new rules in the future is eagerly awaited.

Acknowledgments

The authors would like to thank Antonio Baltasar Mendes and Ines Delgado Martins for their invaluable assistance in the writing of this chapter.

Pedro Lomba is a partner and head of the Technology, Mobility and Communications practice. With over 17 years' professional experience as a lawyer, arbitrator and consultant, he specialises in information technology law, regulation, media and telecommunications law, internet law, mobility law, platform regulation, consumer law, advertising and data protection. His clients include both public and private bodies.
Pedro is also a Professor at the Faculty of Law of the University of Lisbon. He earned a PhD in public law and communications law at the same faculty, and he has a Master's degree in research from the European University Institute.
Pedro was also a Deputy Secretary of State of the Ministry of Regional Development in the 19th Constitutional Government (2013–2015) with responsibilities in the area of media policy and, subsequently, a Deputy Secretary of State and of Parliamentary Affairs in the 20th Constitutional Government (2015). He was also a legal adviser to the Presidency of the Council of Ministers (2003).
Pedro has enjoyed a high profile in the media since 2004. He was a member of the Public Broadcaster's Public Opinion Council between 2016 and 2021.

PLMJ
Av. Fontes Pereira de Melo, 43
1050-119 Lisboa
Portugal

Tel: +351 213 197 300
Email: pedro.lomba@plmj.pt
URL: www.plmj.com

Nádia da Costa Ribeiro is senior counsel in the Technology, Mobility and Communications practice who has more than 15 years' professional experience advising on all areas relating to technology, media and electronic communications.
She has particular experience in regulatory law, consumer and data protection, information and communication technologies, media and audio-visual, communications and fintech. In recent years, she has focused on Portuguese-speaking countries, with an emphasis on Angola.
Before joining PLMJ, Nádia was legal director at Angola Cables, a regulatory and competition manager at Portugal Telecom and a senior consultant at law firms Vieira de Almeida and Broseta.

PLMJ
Av. Fontes Pereira de Melo, 43
1050-119 Lisboa
Portugal

Tel: +351 213 197 300
Email: nadia.costaribeiro@plmj.pt
URL: www.plmj.com

Rita de Sousa Costa is an associate in the Technology, Mobility and Communications practice.
She has a Master's in administrative law, with a minor in data protection, from the Faculty of Law of Universidade Católica Portuguesa and her complementary studies include a course in general regulation of data protection at the Católica-Lisbon School of Business & Economics.
She has also completed two courses in EU law, one at King's College London and the other at the College of Europe in Bruges.
Rita also has experience on secondment in the human resources area of one of the largest multinational companies.

PLMJ
Av. Fontes Pereira de Melo, 43
1050-119 Lisboa
Portugal

Tel: +351 213 197 300
Email: rita.desousacosta@plmj.pt
URL: www.plmj.com

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group