

# Telecoms and Media

An overview of regulation in  
43 jurisdictions worldwide

# 2014

Contributing editors: Laurent Garzaniti and Natasha Good



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**Contributing editors:  
Laurent Garzaniti and  
Natasha Good  
Freshfields Bruckhaus Deringer LLP**

*Getting the Deal Through* is delighted to publish the fully revised and updated fifteenth edition of *Telecoms and Media*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 43 jurisdictions featured. This year's edition also benefits from an expanded overview section, with two new chapters covering Network Sharing, and Convergence in the US Telecommunications and Media Industry.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com).

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Gideon Robertson  
[gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

**Subscriptions**

Rachel Nurse  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

**Business development managers**

George Ingledeu  
[george.ingledeu@lbresearch.com](mailto:george.ingledeu@lbresearch.com)

Alan Lee  
[alan.lee@lbresearch.com](mailto:alan.lee@lbresearch.com)

Dan White  
[dan.white@lbresearch.com](mailto:dan.white@lbresearch.com)

Overview 3  
**Laurent Garzaniti, Natasha Good and  
Hein Hobbelen**  
Freshfields Bruckhaus Deringer LLP

Network Sharing 6  
**Malcolm Webb**  
Webb Henderson

Convergence in the US  
Telecommunications and Media  
Industry: Legal Considerations 10  
**John Nakahata and Michael Nilsson**  
Wiltshire & Grannis LLP

Acknowledgements for Verifying Content 14

Angola 15  
**António Vicente Marques**  
AVM Advogados

Australia 21  
**Simon Muys, Peter Waters and  
Adelina Widjaja**  
Gilbert + Tobin

Austria 29  
**Bertram Burtscher and Gernot Fritz**  
Freshfields Bruckhaus Deringer LLP

Belgium 35  
**Laurent Garzaniti, Hein Hobbelen and  
Anneleen Straetemans**  
Freshfields Bruckhaus Deringer LLP

Bermuda 43  
**Timothy Frith**  
MJM Barristers & Attorneys

Brazil 49  
**Ricardo Barretto Ferreira and  
Paulo Brancher**  
Barretto Ferreira e Brancher Sociedade de  
Advogados (BKBG)

Bulgaria 54  
**Violetta Kunze and Milka Ivanova**  
Djingov, Gouginski, Kyutchukov & Velichkov

Canada 62  
**Laurence J E Dunbar, Leslie J Milton,  
Scott M Prescott and Stephen P Whitehead**  
Fasken Martineau DuMoulin LLP

Chile 69  
**Alfonso Silva Cubillos and  
Eduardo Martin Cuadrado**  
Carey

China 77  
**Chuan Sun, Victoria White and  
Annalisa Heger**  
Freshfields Bruckhaus Deringer

Czech Republic 86  
**Petr Prouza, Lukas Marek and  
Radim Kotrba**  
BBH, advokátní kancelář, s.r.o.

European Union 92  
**Laurent Garzaniti, Thomas Janssens, Hein  
Hobbelen and Alexia Burckett St Laurent**  
Freshfields Bruckhaus Deringer LLP

France 103  
**Jérôme Philippe and Aude-Charlotte Guyon**  
Freshfields Bruckhaus Deringer LLP

Germany 110  
**Norbert Nolte, Sibylle Gering and  
Christoph Werkmeister**  
Freshfields Bruckhaus Deringer LLP

Ghana 117  
**Josiah Kojo Ankoma-Sey and  
Susan-Barbara Adjorkor Kumapley**  
Bentsi-Enchill, Letsa & Ankomah



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## CONTENTS

Greece	123	Malaysia	189	Singapore	248
<b>Dina Th Kouvelou and Nikos Th Nikolinakos</b> Nikolinakos-Lardas Law Firm		<b>Adlin Abdul Majid and Mae Lee Kah Ching</b> Lee Hishammuddin Allen & Gledhill		<b>Chong Kin Lim, Charmian Aw and Shawn Ting</b> Drew & Napier LLC	
Hong Kong	129	Mexico	196	South Africa	261
<b>Chuan Sun, Victoria White and Annalisa Heger</b> Freshfields Bruckhaus Deringer		<b>Bertha Alicia Ordaz-Avilés and Octavio Lecona-Morales</b> Greenberg Traurig, SC		<b>Zaid Gardner</b> ENSAfrica	
India	137	Myanmar	203	Switzerland	267
<b>Atul Dua, Salman Waris and Arjun Uppal</b> Seth Dua & Associates		<b>Chester Toh, Alroy Chan and Daryl Larry Sim</b> Rajah & Tann LLP		<b>Marcel Meinhardt, Astrid Waser and Michael Cabalzar</b> Lenz & Staehelin	
Indonesia	145	Netherlands	208	Taiwan	273
<b>Agus Ahadi Deradjat, Kevin Omar Sidharta and Serafina Muryanti</b> Ali Budiardjo, Nugroho, Reksodiputro		<b>Onno Brouwer, Winfred Knibbeler and Nima Lorjé</b> Freshfields Bruckhaus Deringer LLP		<b>Robert C Lee and Lawrence Liao</b> YangMing Partners	
Ireland	153	New Zealand	214	Tanzania	278
<b>Helen Kelly and Claire Morgan</b> Matheson		<b>Malcolm Webb and Anisa Purbasari</b> Webb Henderson		<b>Kamanga Wilbert Kapinga and Nimrod Mkono</b> Mkono & Co Advocates	
Italy	159	Nigeria	220	Turkey	283
<b>Tommaso Salonico and Luca Ulissi</b> Freshfields Bruckhaus Deringer LLP		<b>Tamuno Atekebo, Otome Okolo and Chukwuyere E Izuogu</b> Streamsowers & Köhn		<b>Gönenç Gürkaynak and İlay Yılmaz</b> ELIG, Attorneys-at-Law	
Japan	168	Poland	227	Ukraine	289
<b>Nao Tsuchiya</b> Hayabusa Asuka Law Offices		<b>Arwid Mednis</b> Wierzbowski Eversheds		<b>Anna Babych and Oksana Krasnokutska</b> Vasil Kisil & Partners	
Kenya	173	Portugal	234	United Kingdom	295
<b>Richard Harney and Terry Otaba</b> Coulson Harney		<b>Belén Granados, Daniel Bobos-Radu and Sofia Lima</b> APTS – Alves Pereira & Teixeira de Sousa, RL		<b>Rod Carlton, Mark Sansom, Francesco Leonetti and Thomas Cooling</b> Freshfields Bruckhaus Deringer LLP	
Lithuania	179	Russia	242	United States	308
<b>Indrė Burbulytė</b> Tark Grunte Sutkiene		<b>Igor Gerber and Andrey Filippenko</b> Freshfields Bruckhaus Deringer LLP		<b>John Nakahata, Kent Bressie and Paul Margie</b> Wiltshire & Grannis LLP	
Macedonia	185				
<b>Elena Miceva and Dragan Dameski</b> Debarliev, Dameski & Kelesoska Attorneys at Law					

# Portugal

Belén Granados, Daniel Bobos-Radu and Sofia Lima

APTS – Alves Pereira & Teixeira de Sousa, RL

## Communications policy

### 1 Regulatory and institutional structure

Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The regulatory and supervisory authority in the communications sector is the National Authority for Communications (ICP-Anacom), an autonomous administrative entity with powers that include:

- assuring regulation and oversight of the communications sector;
- managing the radio spectrum in order to ensure the healthy side-by-side operation of the several different networks and radio stations;
- planning frequencies according to the availability of the radio spectrum;
- ensuring conditions of effective competition;
- assisting the Portuguese government, namely the Ministry of Public Works, Transport and Communications, in policymaking and in the definition of telecoms-related strategy and guidelines; and
- arbitration within the communications sector.

In addition to its regulatory and supervisory activity, ICP-Anacom also collaborates with the Portuguese Competition Authority (AdC) and the Regulatory Entity for the Media (ERC) in other matters (eg, pricing and concentration in the communications sector).

Several legal statutes regulate the communications sector in Portugal. The key laws are:

- the Electronic Communications Law (Law 5/2004 of 10 February, as amended by Law 51/2011 of 13 September);
- the Electronic Commerce Law (Decree-Law 7/2004 of 7 January, as amended by Decree-Law 62/2009 of 10 March and Law 46/2012 of 29 August);
- the Data Protection Law (Law 67/98 of 26 October); and
- the Electronic Communications Protection Law (Law 41/2004 of 18 August, as amended by Law 46/2012, of 29 August).

There are no specific rules on both domestic or foreign ownership and market access restrictions. However, foreign undertakings operating in Portugal shall comply with the conditions and restrictions implemented by ICP-Anacom to ensure interoperability of services, efficiency, protection of data, public safety and public health, accessibility, and technological and services neutrality, among other purposes. These restrictions must be proportionate and non-discriminatory.

Moreover, operators or service providers must be companies duly incorporated under Portuguese law.

### 2 Authorisation/licensing regime

Describe the authorisation or licensing regime.

No special authorisation is required to operate electronic communications networks and services. However, ICP-Anacom must receive a previous notice comprising a brief description of the services to be provided and the estimated date for the beginning of operations, as well as evidence of the compliance with the general legal requirements.

For the allocation of spectrum and numbers a special licensing procedure is required, which is dependant on the ability of the applicant to comply with the conditions associated with usage rights. All service providers requiring the use of spectrum must observe the National Frequency Plan. Wireless service providers, including mobile communications services providers, must apply for and obtain an individual licence for spectrum use.

The allocation of numbers must observe the National Numbering Plan, according to the Electronic Communications Law. Guidelines and general principles are set forth by ICP-Anacom in compliance with the principles of transparency, efficiency, equality and non-discrimination. Providers of fixed or mobile voice services must obtain the necessary numbering resources. The allocation of numbers for specific purposes under the National Numbering Plan takes a maximum of 15 days, extendable by an additional period of 15 days in case of competitive or comparative procedures.

As a general rule, frequency bandwidths allocated to each type of service are established in the National Frequency Plan, according to the Electronic Communications Law. Operators must file an application to obtain the individual rights of use. The allocation of usage rights for frequencies for specific purposes under the National Frequency Allocation Plan occurs within a 30-day period, which can be extended up to eight months if necessary when the granting of rights of use is subject to competitive or comparative selection procedures and always in accordance with the principles of fair competition, reasonableness and transparency.

Administrative Rule No. 1437-B/2008, as amended by Administrative Rule No. 291-A/2011, sets forth that payable fees will be due in the following cases:

- for the issue of statements supporting rights issued by ICP-Anacom and for the granting of rights of use for frequencies and numbers;
- for the provision of electronic communication networks and services (which are due annually and calculated based on the amount of relevant revenues of the operations);
- for the use of numbers (which are also due annually);
- radio fees;
- for the installation of telecommunication infrastructures in buildings; and
- for access to, and provision of, audio-text services and postal services.

**3 Flexibility in spectrum use**

Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Spectrum use is flexible in Portugal and regulated by EU legislation, such as the Directive 2009/114/CE, Commission Decision 2009/766/CE and Decision 676/2002/CE of the European Parliament and of the Council.

ICP-Anacom amended the National Table of Frequency Allocation (QNAF) in 2010 and implemented several measures to promote spectrum use flexibility, namely spectrum re-farming (ie, the flexible use of the 900/1,800MHz spectrum), unifying into a single title the conditions applicable to the exercise of the rights of use of frequencies allocated to all service operators for the provision of land mobile services (GSM and UMTS).

Spectrum trading or assignment is permitted upon prior notification to ICP-Anacom and provided that a favourable opinion is obtained from the Competition Authority, which may oppose such trading or impose conditions in order to avoid any distortion to competition.

**4 Ex-ante regulatory obligations**

Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

All companies authorised to provide a public communications network or an associated service shall provide to ICP-Anacom all relevant information concerning their activity, such as financial data and information concerning future network or service developments that could have an impact on the wholesale services that they make available to their competitors.

If ICP-Anacom gathers evidence of any breach of the general and specific conditions set forth in the Electronic Communications Law which constitutes a threat to public safety or public health, or may create a serious economic or operational issue for other providers or users, it may take urgent interim measures to remedy the situation in advance of reaching a final decision. Such measures cannot be in force for a period exceeding three months.

**5 Structural or functional separation**

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Under the Electronic Communications Law, ICP-Anacom may require structural separation into an independent business operation between (i) the activities related to the wholesale provision of relevant access products and (ii) the operator's network, whenever deemed necessary due to the relevant market position of vertically integrated telecoms companies, particularly when entities that provide public communications network service also:

- operate cable television networks and are additionally controlled by a member state of the European Union or enjoy special rights;
- have a dominant position in a substantial part of the relevant markets; or
- operate cable television networks created under special or exclusive rights in the same geographical area.

In any case, this obligation to proceed with structural separation constitutes an exception to the rule and is subject to prior approval of the European Commission.

**6 Universal service obligations and financing**

Outline any universal service obligations. How is provision of these services financed?

'Universal service obligations' are defined under the Electronic Communications Law as a minimum set of services that users of electronic communications are entitled to (and thus must be made available to them by the operator), such as the connection to the public telephone network at a fixed location, the access to publicly available telephone services at a fixed location, the provision of a comprehensive directory and of a comprehensive telephone directory enquiry service and the adequate provision of public pay phones.

The provision of these services is granted by public tender. Until 2010, Portugal Telecom (PT) was the only designated USP in Portugal after being selected as such until 2025 without any public tender. However, pursuant to the ruling of the European Court of Justice, which considered that the Portuguese state had incorrectly adopted EU Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, public tenders for the selection of universal services in the area of telecommunications were finally held. As a consequence, in 2013 Optimus and ZON were designated USPs for the north and centre regions of the country, and for the Portuguese islands (Azores and Madeira), respectively.

The net costs of this universal service are financed via a compensation fund established by Law 35/2012 of 23 August, provided that such costs are not considered as an 'excessive burden' by ICP-Anacom. Under the Order issued by ICP-Anacom on 9 June 2011, a 'situation of excessive burden' is deemed to occur if (i) the market share of the service provider on fixed telephone service, calculated on an annual basis, is below 80 per cent; and (ii) the calculated net cost of the universal service is not less than €2.5 million.

Broadband and next generation mobile services are not currently considered to be a part of an operator's universal service obligations.

**7 Number portability**

Describe the number portability regime in your jurisdiction.

Number portability is possible across networks and for all types of operators within a maximum time frame of one day. If portability is not completed within one working day the user will be entitled to compensation of €2.50 per day of delay.

Once the number portability has been requested by the user, the service rendered to him or her will be interrupted for a maximum period of three hours. This three-hour period is called the 'portability window'. If service disruption lasts longer than three hours, the user will be entitled to compensation of €20 per number for each day of interruption, up to a maximum liability of €5,000.

Interconnection prices in relation to number portability must be cost-oriented and direct charges to subscribers, if any, must not constitute a disincentive to portability. Provided that the user is not in breach of any exclusivity agreement, in which case compensation might be due to the operator, portability will not carry any additional costs. However, the new operator can charge a reasonable and cost-based fee for number portability.

ICP-Anacom is the Portuguese authority in charge of monitoring portability operations in order to ensure that service providers (i) offer reasonable prices and (ii) provide consumers with appropriate and transparent information on pricing and conditions. Also within ICP-Anacom's powers is the regulation of the rules required for the performance of portability, pursuant to the general consultation procedure set forth in the Electronic Communications Law. However, ICP-Anacom cannot impose retail tariffs for portability in a manner that may distort competition.

**8** Customer terms and conditions

Are customer terms and conditions in the communications sector subject to specific rules?

Without prejudice to other legislation on consumer rights or the provisions of Decree-Law No. 446/85 of 25 October (ie, the regulation on standard provisions and forms of agreements), the above-mentioned Electronic Communications Law sets forth the minimum content of adhesion contracts in the communications sector, which must include:

- a description of the services provided, the levels of service quality offered, and the time necessary for the initial connection;
- the types of maintenance service offered;
- details of prices and tariffs;
- the duration of the contract and the conditions whereby the contract or services may be renewed, suspended or terminated; and
- any compensation and the refund arrangements that apply if contracted levels of service quality are not met.

ICP-Anacom is the entity responsible for consumer protection and for supervising operators' compliance with the Electronic Communications Law. In pursuit of those assignments, ICP-Anacom defines guidelines on the minimum content of adhesion contracts (eg, Orders dated 11 December 2005 and 1 September 2008), where it clarifies and regulates the rules on adhesion contracts under the Electronic Communications Law.

By means of the above-mentioned orders, ICP-Anacom has also reaffirmed the obligations of transparency regarding consumer terms and conditions provided for in the Electronic Communications Law, such as the obligation to publish appropriate information in respect of the provision of access and interconnection by an operator, including terms and conditions for supply and use.

Operators must communicate to ICP-Anacom all standard contracts concluded with consumers, which must also be made available to the public.

**9** Net neutrality

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

As a general rule, internet service providers do not have the legal obligation to monitor internet usage or stored information, nor do they have powers to investigate if any offences have been committed when using their internet services.

Notwithstanding the above, internet service providers shall remain liable in respect of any clearly illegal information stored by them should they become aware of it. Thus, they are required to:

- promptly inform ICP-Anacom whenever they receive notice or become aware of offences committed when using their internet services;
- identify the recipients of their services with whom they have entered into storage agreements; and
- comply and collaborate with the competent authorities' efforts to terminate or prevent illegal activities, namely through the removal or disabling of access to information or the supply of the lists of owners of hosted websites, when required.

In addition, restrictive measures can be applied to internet service providers by ICP-Anacom, or by the Portuguese courts, in cases of (i) damage or threat of damage to users or other third parties; (ii) breach of public policies; or (iii) risk to public health, public security or in respect of the values of human dignity.

**10** Next-Generation-Access (NGA) networks

Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The Portuguese government has affirmed its position on the importance of promoting NGA network implementation, namely under Resolution of the Council of Ministers No. 120/2008, which approved strategic guidelines in this respect. The Resolution foresees the adoption of an active role by the government and local authorities and a focus in the development of NGA network accessibility in rural and remote areas, via direct investment and investment subsidies.

With the subsequent approval of Administrative Rule No. 829/2010 of 31 August, the Portuguese government considered the financing of NGA networks a strategic priority, focusing on the implementation of measures for the development of rural areas through (i) the establishment of non-reimbursable subsidies for installing high-speed electronic communications networks in those areas; (ii) the building of support infrastructures; and (iii) the set-up of broadband telecommunications equipment, among others.

In addition, Decree-Law 123/2009 approved several measures related to the building of infrastructures apt for the accommodation of electronic communications networks and the installation of electronic communications networks and support infrastructures in housing developments, urban centres and concentrations of buildings.

**11** Data protection

Is there a specific data protection regime applicable to the communications sector?

Law 41/2004 sets forth a data protection regime applicable to the communications sector, implementing several measures destined to ensure the inviolability of communications and related traffic data. In particular, this law expressly prohibits the listening in, tapping, storing or any other kind of interception or surveillance activity resorting to electronic communications networks, without the prior express consent of the users concerned.

However, there are some exceptions to this rule, including the following:

- Under the criminal procedure rules it is possible to record and/or intercept communications for evidence gathering purposes, provided that such data interception was subject to a prior judicial order applied for by a criminal police authority.
- It is also possible to record communications and related traffic data in the context of lawful business activities, for the purpose of documenting a business transaction. However, the parties must (i) be previously informed of such data recording (including the purposes of the same) and of their right of access the same and how to exercise such right; and (ii) give their consent. For this purposes, not only the users but also the operator's employees are considered data subjects.
- It is also possible to record communications by and for public services, if such records are intended to provide for emergency situations of any nature.

As a general rule, the storing of personal data cannot take longer than the period of time deemed necessary in relation to the purposes for which such data was collected or for which the same is further processed. However, it can be stored for longer periods of time for historical, statistical or scientific purposes, when authorised by the Portuguese Data Protection Authority.

Under Law 32/2008 of 17 July, the following data shall be retained by network operators and service providers for a period of one year from the date of the communication:

- tracing and identification of communication's source;
- destination;
- date;
- time and duration;
- users;
- type of equipment used; and
- its location.

This data must be retained in such a way that it will not cause any undue delays when handed over to the competent authorities for any legitimate reasons (justified by a court order). It will also be subject to the similar security and protection as the data on the network.

Providers of publicly available electronic communications services or of public communications networks must take all required technical and organisational measures to protect the data against (i) accidental or unlawful destruction; (ii) accidental loss or alteration; and (iii) unauthorised or unlawful storage, processing, access or disclosure. The same must also:

- ensure that the data is only accessed by authorised personnel;
- destroy all data at the end of the legal period of retention, with the exception of those that have been preserved by court order; and
- block data from the moment it is retained and only unblock it upon request of the competent authorities, with the exception of the users' names and addresses.

## 12 Key trends and expected changes

Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Several measures were implemented as a result of the memorandum of understanding signed between the Portuguese government, the European Central Bank and the International Monetary Fund. These include, for example, less restriction to the entry to foreign investment in the national telecommunications and media market with the aim of promoting competition and ultimately benefiting the end-users. As a result, legislative reforms and a new legal framework from 2011 and 2012 are still being implemented today.

The most recent key changes in the Portuguese communications sector concern technological innovation and alterations to the market structure. In respect of the technological innovation, it should be noted that the widespread implementation of terrestrial digital TV broadcasting (TDT) took place in 2012.

As to the market structure alterations, the following topics are worth mentioning:

- Lycamobile entered the Portuguese market in September 2012;
- in July 2013, a public tender awarded Optimus and ZON with the provision of universal services for the north and centre regions of the country, and for the Portuguese islands (Azores and Madeira), respectively;
- Later in 2013, the Portuguese Competition Authority approved the merger of ZON and Optimus, which is expected to promote competition in all sectors of the telecoms and media field and the acquisition of ONI by ALTICE; and
- more or less at the same time, the Portuguese government approved the privatisation of CTT (the national courier service provider).

## Media

### 13 Regulatory and institutional structure

Summarise the regulatory framework for the media sector in your jurisdiction.

All media companies and entities in Portugal are subject to the supervision of the Regulatory Entity for the Media (ERC), an autonomous administrative authority. In addition to its regulatory and monitoring activity, the ERC is also responsible for granting new licences to television and radio operators, promoting competition, among other additional powers and duties.

The Portuguese National Telecommunications Authority (ICP-Anacom), has jurisdiction over the management of the radio electric spectrum, namely on its planning, licensing, monitoring and supervision of the technical conditions of its use by the operators.

The legal framework for the media sector includes the following statutes:

- the Television Law, approved by Law 27/2007 of 30 July, as amended by Law 8/2011 of 11 April, which adopts Directives 97/36/CE and 2007/65/EC of the Parliament and Council;
- Resolution 26/2009 of 17 March, which implemented the analogue-digital transition process and introduced terrestrial digital television (TDT) (in 2012);
- the Radio Law, approved by Law 54/2010 of 24 December;
- the Press Law, approved by Law No. 2/1999 of 13 January, as amended by Laws Nos. 18/2003, of 11 June and 19/2012, of 8 May;
- the Electronic Communications Law, approved by Law No. 5/2004 of 10 February, as amended and republished by Law No. 51/2011 of 13 September and subject to subsequent addition by Laws Nos. 10/2013, of 28 of January and 42/2013 of 3 July;
- Law 23/96 of 26 July, which establishes mechanisms to protect the users of essential public services;
- the Code of Advertising, approved by Decree-Law 330/90 of 23 October, as amended by Law 8/2011 of 11 April;
- the Data Protection Law, approved by Law 67/98 of 26 October;
- the Code of Copyright and Related Rights, approved by Decree-Law No. 63/85 of 14 March, as amended by Law No. 82/2013 of 6 December;
- the Law of the Art of Cinema and of Cinematographic and Audiovisual Activities, approved by Law No. 55/2012 of 6 September, regulated by Decree-Law 124/2013 of 30 August with respect to support measures for the development and protection of cinema and audio-visual activities, investment obligations and the registration of cinema and audio-visual works and companies; and
- the Journalist's Statute, approved by Law No. 1/99 of 13 January, as amended by Law No. 64/2007 of 6 November.

In the media sector the role of self-regulation is also important. In the field of advertising, the Civil Institute for Auto-Regulation on Commercial Communication (ICAP), which represents the majority of the advertising industry (ie, advertisers, agencies and media companies), implements a self-regulation system and monitors the compliance with the applicable advertising law rules. To such effect, ICAP has adopted a Code of Practice, as well as other rules and recommendations that are applicable to its members.

**14** Ownership restrictions

Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Access to media activity in Portugal is not denied to foreign companies. However, in accordance with the above-mentioned Television, Radio and Press Laws which establish the rules applicable to the access to those activities, the following conditions are applicable:

- As to television activity:
  - It can only be pursued by commercial or cooperative companies having as their principal object the exercise of such activity.
  - The companies must have a minimum share capital of between €50,000 and €5 million in accordance with their type and geographic cover.
  - The companies should be subject to prior licensing or authorisation proceedings.
  - The television operators and distributors and their respective services must be registered with the ERC.
- As to radio activity:
  - It can only be pursued by commercial or cooperative companies having as their principal object the exercise of such activity.
  - There is no requirement as to minimum capital.
  - The companies should be subject to prior licensing or authorisation proceedings.
  - The radio operators and respective services must be registered with the ERC.
- As to press activity:
  - No specific type of company or organisation is required (the publications can be owned by individuals or collective persons).
  - There is no requirement as to minimum capital.
  - Nevertheless, periodic publications and news companies or enterprises must be registered with the ERC.

With a view to ensuring ownership and management transparency of the entities involved in media activities, it is required:

- that the shares of companies established under anonymous structures must be nominative; and
- that the identity of the owners of shares and the structure and members of the management bodies be disclosed.

In addition, broadcasting activity shall not be performed or financed by political parties or associations, local authorities or their associations, trade unions, or employer or professional associations, either directly or indirectly, unless such activity is exclusively performed through the internet and consists in the organisation of programme services of a teaching, institutional or scientific nature.

Regarding cross-ownership of media companies, broadcasters shall be subject to the general scheme for protection and promotion of competition, particularly with regard to prohibited practices and concentration of companies, as well as to the legal scheme that governs openness and concentration in media ownership.

No natural or legal person of the private or cooperative sector shall hold, either directly or indirectly, through a controlling relationship, a number of licences for specific services of more than 50 per cent of the total number of licences given to similar services in the same area of cover. In the case of radio operators, one operator cannot hold in excess of 10 per cent of the total number of licences granted in Portugal.

Changes in the ownership of licence operators can only occur after three years from the original concession of the licence, two years after project changes and one year after the last renewal.

Also, in accordance with the relevant interests at stake, it is required for the press activity that the ERC be notified of any acquisitions by national news companies of any participation in similar entities.

**15** Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Television activity is conditional upon the issuance of a licence, by means of a public tender where use of the terrestrial spectrum intended for broadcasting purposes is determined. There can be public tenders for unrestricted free-to-air television programme services and for conditional access television programme services or free-to-air television programme services subject to a subscription.

Television activity is also subject to authorisation whenever it does not use the terrestrial spectrum or integrate the offer of a television operator duly licensed for the activity of conditional television programmes or non-conditional but subject to a subscription.

Licensing proceedings referring to television programmes of non-conditional free access and authorisation proceedings are prepared by the ERC together with the advice of ICP-Anacom as to the technical conditions of the tenders. However, the licensing of television programmes of conditional access or non-conditional but subject to subscription are prepared by ICP-Anacom, which shall submit to the ERC its conditions for the admission of bidders.

The regulatory authority responsible for drawing up the process shall notify the applicants, within 15 days from receipt of the applications, of any insufficiencies observed therein, which shall be corrected within the following 15 days.

Applications deemed eligible by the competent regulatory authority after any insufficiencies have been corrected, shall be subject to a decision to grant or reject qualifying documents requested within 90 days in case of a licensing application or 30 days where an authorisation application is concerned.

Broadcasters shall commence broadcasting of the authorised or licensed television programme services within 12 months from the date of the final decision assigning the corresponding qualifying document.

Licences or authorisations are to be issued for a 15-year period and will be subsequently renewable for equal periods.

The fees for a licence are €286,518 for national broadcasting, €45,798 for regional broadcasting, and €11,424 for local broadcasting. Fees for authorisation are €28,662.

The exercise of radio broadcasting activity will be subject to the prior issue of a licence, as a result of a public tender or following an authorisation to such effect, depending on whether or not the programme services to be provided will use the terrestrial spectrum.

Licensing proceedings referring to radio programmes services at a national and regional level are prepared by ICP-Anacom, which shall submit for the ERC's perusal the conditions for admission of the bidders. The licensing of local radio and authorisation proceedings are prepared by the ERC, which shall obtain the advice of ICP-Anacom as to the technical conditions of the tenders.

The regulatory authority responsible for drawing up the process shall notify applicants of any insufficiencies observed in their respective applications, within 15 days from reception of the applications, which shall be corrected within the following 15 days.

Applications deemed to be eligible shall be the object of a decision on whether or not to grant the requested qualifying documents within 90 days where a licensing proceeding is concerned, or 15 days where an authorisation proceeding is concerned.

Radio broadcasters must start broadcasting their licensed or authorised programme services within six months from the date of the final decision granting the corresponding qualifying document.

Licences or authorisations shall be issued for a 15-year term, and may be subsequently renewed for similar time periods.

Fees payable to the regulatory authority for a licence are €28,662 for national broadcasting, €11,424 for regional broadcasting and €5,712 for local broadcasting. Fees for authorisation are €3,978.

Radio broadcasting activity consisting in the broadcast of programme services exclusively via the internet does not require prior authorisation and is instead only subject to registration.

## 16 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Television and radio broadcasting is based on the principle of programming (or scheduling) freedom, which means that public and administrative authorities (with the exception of the courts) cannot prevent, limit or impose any restrictions on the broadcasting of any programmes.

Notwithstanding the above, television and radio broadcasting companies must comply with several rules, including the following:

- Television (with national coverage):
  - broadcasts shall be spoken or subtitled in Portuguese;
  - they must devote at least 50 per cent of their broadcasts to the broadcasting of original Portuguese language programmes, reserving at least 20 per cent of their airtime to creative programmes produced originally in Portuguese, excluding the time reserved for advertising, teleshopping and teletext services. It may comprise up to 25 per cent of programmes originated in other Portuguese-speaking countries;
  - a majority proportion of their transmission time must be reserved for European works, excluding the time allocated to news services, sports events, games, advertising, teleshopping and teletext services; and
  - broadcasters must ensure that at least 10 per cent of their transmission time consists of the broadcasting of European works created by independent producers and produced less than five years previously, excluding the time devoted to news, sports events, games, advertising, teleshopping and teletext services.
- Radio:
  - local radio services (either broadcasting generalist programmes or thematic information) are also obligated to broadcast programmes of social, economic, scientific or cultural relevance to listeners in the corresponding geographical area; and
  - the broadcast programming or scheduling must include Portuguese music, with a minimum quota ranging from 25 to 40 per cent. This quota must include at least (i) 60 per cent of music composed or performed in Portuguese by citizens of European Union member states; and (ii) 35 per cent of music whose first phonographic release or public broadcast occurred within the previous 12 months; however, the above-mentioned minimum quotas do not apply to thematic music programme services whose specific programming model is based on the broadcasting of musical genres that are insufficiently produced in Portugal.

## 17 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast media advertising is regulated by the Advertising Code, the Television Law and the Radio Law (the latter two whenever advertising is broadcasted by television or radio, respectively).

One must also take into account the above-mentioned ICAP rules, in particular its Code of Practice.

Online advertising is also subject to the Advertising Code, as well as to the E-commerce Act approved by Decree-Law No. 7/2004 of 7 January, which adopted Directive 2000/31 of 8 June (on certain legal aspects of information society, in particular electronic commerce, in the internal market).

## 18 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Must-carry obligations are envisaged in the Electronic Communications Law and in the Television Law (in the latter case for television broadcasting). In addition, in 2012 the ERC passed several orders regulating the must-carry obligation regime under the Electronic Communications Law.

According to the Electronic Communications Law, the competent regulatory authority shall impose must-carry obligations directed at the transmission of radio and television programming that is accessible for disabled end-users. The competent regulatory authorities would be the ERC (when it comes to determining which programming services must be subject to must-carry obligations) and ICP-Anacom (regarding the identification and definition of the technical means required to fulfil those obligations).

These obligations are applicable to the operators of electronic communications networks used in radio or television broadcasts, provided that:

- these networks are used by a significant number of end-users as their principal means of receiving radio and TV broadcasts; and
- the above-mentioned must-carry obligations are deemed to meet clear objectives of general interest.

Must-carry obligations must also be reasonable, proportionate and transparent and are subject to periodical review. The competent regulatory authority may determine the remuneration corresponding to the imposed must-carry obligations.

Failure to comply with must-carry obligations constitutes a very serious breach.

So far the ERC has not reviewed the services that should have must-carry status, and ICP-Anacom has not yet imposed any must-carry obligations on transmission operators.

## 19 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is not regulated differently from traditional broadcast media. However, due to the ever-growing relevance of new media in the Portuguese market one can expect additional rules and regulations to be approved in the near future.

In this respect, the Portuguese Data Protection Authority (CNPD) has very recently passed a resolution forbidding the monitoring by a company of e-mails and Facebook accounts of its employees without their express consent. As a consequence, labour regulations concerning information technology that had not been revised since 2002 were updated to better fit the contemporary social network and new media conjuncture and the data protection legal framework in force.

This prohibition is partially lifted in those cases where there is the need to monitor information leakage that could endanger the healthy functioning of the company's business. If so, the employer has the possibility of confirming the destination, time of sending and the subject of the message, but is not allowed to review its content.

## 20 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Council of Ministers Resolution No. 26/2009 of 17 March ruled that the ceasing of terrestrial analogical television broadcasting (also known as the 'switch-off') should take place before 26 April 2012.

The Switch-Off Plan (PSO) was scheduled to take place in three phases:

- Phase I (12 January 2012) – continental coastal strip;
- Phase II (22 March 2012) – autonomous regions of the Azores and Madeira; and
- Phase III (26 April 2012) – remaining Portuguese continental territory.

According to the final report by the Digital Television Migration Monitoring Group dated 8 November 2012, the final assessment of the transition from analogue to digital was positive. Not only does Portugal now have a quality, free-access, nationwide television service, but also, due to efficiency gains on spectrum usage on the VHF/UHF bands, the switch-off created conditions to improve broadcasting services and made room for the introduction of new TV and communications services.

On the technical side, the adoption of the MPEG-4 standard paved the way for the introduction of high-definition television, which foresees a future transition from the MPEG-2 system to the MPEG-4 system. In addition, to improve efficiency in spectrum management a single frequency network (SFN) was implemented, which allows for the freeing up of frequencies for other uses, both in television broadcasting and in other electronic communications services.

## 21 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multi-channelling, high definition, data services)?

The model chosen for the introduction of digital terrestrial television (DTT) in Portugal consisted of two public tenders with the aim of assigning a limited number of rights of use of frequencies for DTT broadcasting, in order to support the following operations:

- one right of use of frequencies covering the national territory, with the utilisation of a multiplexer (Mux A) intended for the broadcast of free-to-air (FTA) television programme services; and
- five rights of use of frequencies to be awarded to a single entity, corresponding to (i) two for coverage of the national territory with the utilisation of multiplexers 'B' and 'C' (Mux B and C); and (ii) three for partial coverage of the continental territory with the utilisation of multiplexers 'D', 'E', and 'F' (Mux D, E and F) intended for the broadcast of pay-TV television programme services.

Under the public tender regulations concerning FTA television programme services, the holder of the right to use frequencies must comply with several obligations, including an obligation to reserve capacity and transport for the high-definition transmission of television programme services broadcasted in analogue mode via hertzian wave held by the licensed or concessionaire operators on the date on which the Law of Television entered into force.

The broadcasting licence for the broadcast of FTA television programme services was awarded to PT Comunicações, SA, which was the only bidder at the respective public tender. For the purpose of ensuring nationwide coverage with Mux A, different channels were given in the band 470–862MHz, including channel 67 (838–846MHz) for the operation of an SFN network across the continental territory.

In accordance with the public tender regulations concerning the pay-TV television programme services, the right of use of frequencies and the broadcasting licence could not be awarded to undertakings holding a share of 50 per cent or more of the pay-TV market.

## 22 Media plurality

Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The preservation of media plurality in Portugal is guaranteed by several essential statutes, including articles 38(4) and 39 of the Portuguese Constitution. Article 38(4) establishes the principle of freedom of the press and other media and the independence of media from political and economic power. It also establishes the principle of specialisation for undertakings that own general information media, as well as obligations of non-discriminatory treatment and prevention of concentration, specifically through multiple and cross-participations. Article 39 concerns media regulation and sets out the essential principles for the activity of the ERC, which must ensure (i) the right to information and freedom of press; (ii) the non-concentration of media ownership; (iii) the independence from political and economic powers; (iv) the respect of personal rights, freedoms and guarantees; (v) the statutes and rules that regulate the work of the media and the plurality of opinions in a public forum; and (vi) the exercise of rights to broadcasting time, of reply and political response.

In addition, the Television Law, as well as the Press Law and the Radio Law, all stress the importance of providing the Portuguese public with pluralist programming and information.

As far the television undertakings are concerned, the ERC has the power to issue a prior binding opinion in relation to merger operations that can be negative if there are significant risks to freedom of expression or pluralism of opinion. A similar solution had already been established for other mergers in the press subsector.

In respect of the radio activity, merger operations require prior clearance from the ERC, which can be denied should the concentration manifestly affect freedom of expression or pluralism of opinion.

## 23 Key trends and expected changes

Provide a summary of key emerging trends and hot topics in media regulation in your country.

The Financial Assistance Programme negotiated with the Portuguese government includes the implementation of several austerity measures, some of which affected the media sector (eg, the postponed privatisation of the public television channel RTP).

Key changes to the Television Law and to the statutes of RTP have been recently approved by Parliament. These changes concern RTP's financing model and provide for (i) a new concession agreement for public service television and radio broadcasting and (ii) the creation of an independent board with the scope of protecting RTP from political interferences and defining strategic guidelines for the provision of public service obligations.

The ERC has recently passed a resolution establishing a multi-year plan designed to promote programming accessibility to users with audio-visual disabilities. The initiative was approved in January 2014, and covers a proposed period of time that extends into 2017.

**Regulatory agencies and competition law**

**24 Regulatory agencies**

Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The two key regulatory authorities in the telecoms and media sector in Portugal are ICP-Anacom and the ERC. Both have financial and organisational autonomy from the Portuguese government. While ICP-Anacom concerns itself with the use of spectrum, broadcasters and telecommunications operators, the ERC regulates and supervises the content of media communications. The duties of the latter include the promotion of competition and the granting of new licences to television and radio operators, as well as other media-related matters.

The Portuguese Competition Authority collaborates with both ICP-Anacom and the ERC to promote and supervise competition in the telecoms and media sector, in matters such as pricing and concentration of media or telecoms companies.

**25 Appeal procedure**

How can decisions of the regulators be challenged and on what bases?

Decisions by local authorities on regulatory matters are administrative in nature and may be appealed to the administrative courts based, *inter alia*, on the following merits:

- recognition of subjective legal situations arising directly out of legal administrative standards or acts;
- recognition of the right to refrain from a behaviour, in particular not to issue administrative decisions when there is a threat of future damage;
- to obtain a decision ordering the regulators to pay sums, hand over items or to take an action;
- to obtain a decision ordering the regulators to repair damage or pay compensation;
- settlement of disputes relating to the interpretation, validity or performance of contracts that fall under the jurisdiction of the administrative courts;

- to obtain a decision ordering the regulators to carry out legally required administrative acts; and
- to obtain a decision ordering the regulators to take the steps and measures required to restore subjective legal situations.

However, in respect of misdemeanour proceedings resulting from the breach of the regulatory framework on electronic communications, all penalties, fines and other ancillary measures applied by the regulators can be subject to appeal, the commerce courts having exclusive jurisdiction. These proceedings comprise two general stages: an administrative stage, conducted by the competent regulator, and a subsequent judicial stage, before the courts.

The rulings by the commerce courts can be appealed to the district judicial courts and to the Supreme Court of Justice, depending on the circumstances of the case. Once an appeal from a decision is filed, the regulator must submit the briefs to the Public Prosecutor’s Office within 20 working days and is entitled to attach allegations or other items or information deemed relevant and to provide evidence. The court shall decide on the grounds of the evidence presented during (i) the course of the hearing and (ii) the administrative stage of the breach proceedings.

Once the final decision is rendered, the regulators are entitled to certain prerogatives, such as the right to file an autonomous appeal. Also, in the event of an appeal against a decision to apply a penalty or fine, the Public Prosecutor’s Office cannot withdraw the accusation without the agreement of the regulator.

**26 Competition law in the communications and media sectors**

Describe the key merger and antitrust decisions in the communications and media sectors adopted over the past year by your antitrust authority.

In 2013 the Portuguese Competition Authority approved the merger between ZON and Optimus, which is expected to promote competition in all sectors of the telecoms and media field.

The Competition Authority also approved the acquisition of ONI by ALTICE, following the acquisition of Cabovisão by the latter in 2012.

Although the merger between Portugal Telecom (PT) and the Brazilian telecommunications services provider, Oi, has not yet been approved in Portugal, it has been green-lighted by the Brazilian Administrative Council for Economic Defence (CADE), following a merger agreement signed in October 2013.

**APTS | ALVES PEREIRA & TEIXEIRA DE SOUSA RL**

**Belén Granados**  
**Daniel Bobos-Radu**  
**Sofia Lima**

**bgranados@alvespereira.com**  
**dbradu@alvespereira.com**  
**slima@alvespereira.com**

Avenida da Liberdade, 38, 3º andar  
 1250-145 Lisbon  
 Portugal

Tel: +351 21 370 01 90  
 Fax: +351 21 382 90 03  
 www.alvespereira.com

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