
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

SIXTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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EDITOR'S PREFACE

This fully updated sixth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs relevant to both existing service providers and start-ups in 29 jurisdictions around the world. It is intended as a business-focused framework for beginning to examine evolving law and policy in the rapidly changing TMT sector.

The burgeoning demand for broadband service, and for radio spectrum-based communications in particular, continues to drive law and policy in the TMT sector. The disruptive effect of these new ways of communicating creates similar challenges around the world:

- a* the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens;
- b* the reality that access to the global capital market is essential to finance that infrastructure;
- c* the need to use the limited radio spectrum more efficiently than before;
- d* the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do not become bottlenecks that stifle innovation or consumer choice; and
- e* the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

A global focus exists on making radio spectrum available for a host of new demands, such as the developing 'Internet of Things,' broadband service to aeroplanes and vessels, and the as yet undefined, next-generation wireless technology referred to as '5G'. This process involves 'refarming' existing bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs. In many cases, an important first step will occur at the World Radiocommunication Conference in November 2015, in Geneva, Switzerland, where countries from around the world will participate in a process that sets the stage for these new applications. No doubt, this conference will lead to changes in long-standing radio

spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Many telecommunications networks once designed primarily for voice are now antiquated and not suitable for the interactive broadband applications that can extend economic benefits, educational opportunities and medical services throughout a nation. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Governments are also re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation are also leading to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector.

Changes in the TMT ecosystem, including the increased reliance by content providers on broadband for video distribution, have also led to a policy focus on 'network neutrality' – the goal of providing some type of stability for the provision of important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented can have profound effects on the balance of power in the sector, and raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers.

These continuing developments around the world are described in the following chapters, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka

Latham & Watkins LLP

Washington, DC

October 2015

LIST OF ABBREVIATIONS

3G	Third-generation (mobile wireless technology)
4G	Fourth-generation (mobile wireless technology)
5G	Fifth-generation (mobile wireless technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services

List of Abbreviations

FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node
FTT _x	Fibre to the <i>x</i>
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling—public call offices
UAS	Unified access services

List of Abbreviations

UASL	Unified access services licence
UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access

Chapter 21

PORTUGAL

*Jaime Medeiros and Mónica Oliveira Costa*¹

I OVERVIEW

2014 and 2015 have proven to be landmark years (both for better and for worse) in the TMT industry.

Recent developments in the TMT business environment saw the merger between ZON and Optimus completed in May 2014, and the new brand, NOS, now represents a vertically integrated operator with a convergence of fixed and mobile communications together with pay TV, broadband and cinema distribution and exhibition.

In July 2014, PT Portugal (the former Portuguese telecommunications incumbent) and Vodafone concluded a fibre optics network sharing agreement. The agreement is intended to cover 900,000 homes (approximately 450,000 homes by each party).²

In September 2014, the government completed the privatisation process of CTT – Correios de Portugal, which was the designated provider of the universal postal service. The share capital is now fully owned by private sector shareholders, with 193 institutional shareholders holding a stake of approximately 85 per cent of the company's share capital.³

In December 2014, PT Portugal's fixed and mobile operations were integrated under the same business and brand (MEO).

Again in December 2014, PT Portugal was acquired by Altice. As one of the major consequences of the fall of the Espirito Santo Group, the foreseen merger between

1 Jaime Medeiros and Mónica Oliveira Costa are partners at Coelho Ribeiro & Associados.

2 Implementation of the EU regulatory framework for electronic communication – 2015, available at <http://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-126-EN-F1-1.PDF>

3 CTT Corporate Governance 2014 Report, available at www.ctt.pt/content/Asset/raw-data/13e9f78b-46e8-4a19-b8bc-c333d88f3b74/ficheiro/9bfe2fe9-0694-45f1-a391-f6ef601b1e59/export/RGS%202014_EN_FINAL.pdf.

the Brazilian Oi and PT Portugal was not concluded, and Oi decided to sell its 100 per cent participation of PT Portugal. The acquisition by Altice was notified to the European Commission on 25 February 2015, cleared on 20 April 2015 under Article 6(1)(b) of the EU Merger Regulation subject to conditions and obligations,⁴ and concluded on 2 June 2015. The Commission's decision is conditional upon the divestment of Altice's current Portuguese businesses ONI, a provider of communication services to business customers, and Cabovisão, an operator that provides pay-TV, fixed internet and fixed telephony services to residential customers.

These developments in the business environment are having a significant impact on the convergence of fixed and mobile infrastructures and bundled services. In 2014, service pack customers rose 11.7 per cent to 2.9 million. At the end of 2014, 73 out of every 100 families had packaged services. As at the end of second quarter 2015 (2Q15), there were 3.1 million subscribers to bundled offers in Portugal, representing an increase of 2.6 per cent from the previous quarter and 12.7 per cent over the same quarter of 2014 (2Q14). Quintuple-play (5P) was the combination reporting the most growth (increasing 5.5 per cent over the 1Q15 and increasing 99 per cent compared with 2Q14). Triple-play remained the most common combination (42.5 per cent) in 2Q15, decreasing 0.9 per cent versus the previous quarter and 14 per cent versus 2Q14. In the fixed service sector, the number of telephone accesses increased 1.2 per cent to 4.6 million, mainly due to the wider adoption of package services with access based on networks other than the copper network. The subscription television service grew by 5.7 per cent to 3.35 million subscribers. Broadband internet traffic also climbed, 19.7 per cent in fixed broadband (BLF) and 54 per cent in mobile (BLM). In the mobile service sector, voice traffic increased 10.5 per cent.⁵

We also highlight the following regulatory and legislative developments.

Decree-Law 35/2014 of 7 March repealed the bases of the electronic communications public service concession and terminated, as a public service, the fixed telex service, the fixed switched data transmission service and the telegraph service, as well as the maritime mobile service (MMS) in its public correspondence component. This legislative initiative followed the judgment of 7 October 2010 of the Court of Justice of the European Union, which ruled that the Portugal had failed to fulfil certain obligations under the Universal Service Directive (Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive No. 2009/136/EC of the European Parliament and of the Council of 25 November 2009). As a consequence, universal service in electronic communications was for the first time awarded to operators selected through public tenders. In 2014, and for a period of five years, NOS initiated the provision of telephone service, and MEO is responsible for the public payphone service. Resolution of the Council of Ministers No.

4 European Commission press release, available at http://europa.eu/rapid/press-release_IP-15-4805_en.htm.

5 Anacom – Annual Report and Accounts 2014, available at www.anacom.pt/streaming/Relatorio_Contas2014.pdf?contentId=1363020&field=ATTACHED_FILE.

32-B/2015, published on 22 May, also determined the award to MEO of the universal service provision of comprehensive telephone directory and comprehensive directory enquiry services.

The Postal Law was amended by Law No. 16/2014 of 4 April, introducing changes in the rules regarding the financing of the universal postal service, and streamlining the administrative dispute resolution mechanism.

Law No. 49/2015 of 5 June establishes private copying levies over digital devices, such as mobile phones, smartphones, tablets, scanners, as well as support equipment (USBs, external drives, MP3 and MP4 players, memory cards, etc). The approval of this Law was highly controversial: the President vetoed the law, but it was subsequently reapproved unchanged by a qualified majority at the Parliament.

Law No. 78/2015 of 29 July establishes new rules with regard to the ownership, management and financial transparency of media undertakings. The Law shall enter into force on 30 October, and the first disclosures of ownership and management to the regulator must occur on or before 30 January 2016.

Online gambling is now a regulated legal activity in Portugal. Decree-Law No. 66/2015 of 29 April regulates online gambling, betting and gaming, and it is expected that the first licences in this regard will be issued during Q415.

II REGULATION

i The regulators

Portugal has two independent sectoral regulators: the National Telecommunications Authority (Anacom) in the scope of communications, and the Regulatory Authority for the Media (ERC) with regulatory competences in the media sector. Although both regulators have responsibility for the promotion of competition and pluralism in their respective sectors, this does not preclude the powers vested on the Competition Authority. In fact, regarding matters related to the application of the legal framework for competition in these respective sectors, Anacom, ERC and the Competition Authority must cooperate and collaborate with each other, and pay due regard to their respective powers.

The statutes of Anacom (formerly ICP-Anacom) were approved by Decree-Law No. 39/2015 of 16 March, under which Anacom is endowed with regulatory, supervisory, monitoring and sanctioning powers. It is also incumbent upon Anacom to promote out-of-court dispute settlement mechanisms between providers subject to its regulation as well as consumers and other end-users of electronic and postal communications.

Anacom is a legal person governed by public law and statutes, and is independent from the government at the organisational, functional, technical and financial levels. Anacom is not subject to government oversight or authority in connection with its functions, and members of the government are not allowed to make recommendations or directives with regard to Anacom's regulatory actions or the priorities it will adopt.

Anacom's main areas of intervention are in the following areas:

- a* electronic communications networks;
- b* electronic communications services;
- c* spectrum management;

- d* radio communications services;
- e* the postal area;
- f* radio and telecommunications terminal equipment;
- g* the installation of infrastructures for telecommunications in buildings; and
- h* some aspects of information society services, namely e-commerce.

Regarding radio and television, the broadcasting and the management of the spectrum are subject to Anacom regulation and supervision.

The following is a brief outline of the main sources of law regarding communications:

- a* Law No. 5/2004 of 10 February (as subsequently amended) is the main act regarding electronic communications (Electronic Communications Law). It establishes the legal regime applicable to electronic communications networks and services and to associated services, and defines the assignment of Anacom in this field. The Electronic Communications Law adopted Directives No. 2002/19/EC, No. 2002/20/EC and No. 2002/21/EC of the European Parliament and of the Council of 7 March, amended by Directive No. 2009/140/EC of the European Parliament and of the Council of 25 November, and Directives No. 2002/22/EC of the European Parliament and of the Council of 7 March, amended by Directive No. 2009/136/EC of the European Parliament and of the Council of 25 November, and 2002/77/EC of the Commission of 16 September.
- b* In the field of e-commerce, the main act is Decree-Law No. 7/2004 of 7 January (as subsequently amended), which transposed into the Portuguese legal system Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.
- c* With regards to data protection, the main sources of law are Law No. 67/98 of 26 October, which transposed into the Portuguese legal system Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and Law No. 41/2004 of 18 August (as subsequently amended) concerning the processing of personal data and the protection of privacy in the electronic communications sector, which transposed Directive 2002/58/EC of the European Parliament and of the Council of 12 July and Directive 2009/136/EC.
- d* In the postal area, the main source of law is Law No. 17/2012 of 26 April (as subsequently amended), which lays down the legal regime that governs the provision of postal services under a full competition regime in the national territory, as well as international services to or from the national territory, and transposes into the Portuguese legal system Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008.

The media sector is regulated by ERC. ERC is an independent regulator that is not subject to recommendations or directives from the government or any other political body. The exclusive competence of ERC is restricted to the activity of media companies from the perspective of freedom of speech and the content of media, and this competence should

not collide with the competence of other regulators. In this respect, it is important to note that radio and television broadcasting and the management of the spectrum is under Anacom regulation and supervision.

In the media sector, the main sources of law are as follows:

- a* The Radio Act (Law No. 54/2010 of 24 December, as subsequently amended) concerning access to and pursuit of radio broadcasting activity in the national territory.
- b* The Television Act (Law No. 27/2007 of 30 July, as subsequently amended), which regulates access to and performance of television activities. This Law transposes into national law a part of the provisions of Council Directive No. 89/552/EEC of 3 October, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June, and Directive No. 2007/65/EC of the Parliament and of the Council of 11 December.
- c* Law No. 78/2015 of 29 July governs the promotion of transparency with regards to ownership, management and means of financing of media undertakings. The Law shall enter into force on 30 October 2015, and the first disclosure of ownership and management to the regulator shall occur on or before 30 January 2016.
- d* The Press Act (Law No. 2/99 of 13 January) governs the basic principles of media content and freedom of speech.

ii Regulated activities

TMT activities are fully liberalised, and the general rule is that the provision of electronic communications networks and services, whether publicly available or not, is only subject to a communication duty and to a general authorisation regime; such provision of networks or services is not dependent on any prior decision or act of Anacom.

However, there are exceptions, namely:

- a* the allocation of spectrum;
- b* the use of numbering;
- c* the use of radio communications networks and stations;
- d* television broadcasting using the terrestrial spectrum; and
- e* radio broadcasting.

The space where radio waves may propagate constitutes a public domain of the state, and Anacom is responsible for the management of the spectrum in coordination with the European Commission and the regulatory authorities of other Member States with regard to strategic planning, coordination and harmonisation of the use of radio spectrum in the European Union, namely in the scope of multiannual radio spectrum. The allocation of spectrum and the assignment of frequencies should be based on objective, transparent, non-discriminatory and proportionate criteria.

The management of spectrum is subject to the principles of:

- a* technology neutrality, in accordance with which all types of technology used for electronic communications services may be used in frequency bands declared to be available for electronic communications services, and are published in the National Frequency Allocation Plan as such; and

- b* service neutrality, in accordance with which all types of electronic communications services may be provided in frequency bands declared to be available for electronic communications services, and are published in the National Frequency Allocation Plan as such.

Licences for the use of frequencies are granted for 15 years and are renewable.

The use of numbers depends on the allocation of rights of such use. Such rights may be allocated both to providers and users, and the law warrants that the allocation procedure must be open, objective, transparent, non-discriminatory and proportional.

The use of radio communications networks and stations is also subject to licensing. Anacom is responsible for granting licences, and the licensing procedure is ruled by Decree-Law No. 151-A/2000 of 20 July, as further amended.

With regard to television broadcasting, the licensing regulation differs according to whether there is an allocation of the terrestrial spectrum. Licences to broadcast using the terrestrial spectrum are subject to public tenders. These 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. If the proposed broadcasting activity does not use the terrestrial spectrum, authorisation is given upon the request of interested undertakings. A simple registration is needed where the television activity consists of the broadcast of television programme services exclusively through the internet that are not retransmitted by other networks.

Illegal television activity is considered a criminal activity that is subject to a term of imprisonment of up to three years or to a daily pecuniary sanction for up to 320 days.

Access to radio broadcasting activity is also regulated. Radio broadcasting is conditional upon the issue of a licence by means of public tender, or of an authorisation, according to whether programme services to be provided will use the terrestrial broadcast spectrum. Radio broadcasting through the internet is only subject to registration.

Illegal radio activity is considered a criminal activity that is subject to a term of imprisonment of up to three years or to a daily pecuniary sanction for up to 320 days.

iii Ownership and market access restrictions

The TMT market is fully liberalised, and there are no foreign ownership restrictions with regard to telecom services or networks, without prejudice to the application of the legal regime of competition in the electronic communications sector.

However, there are several ownership and market restrictions in the media sector that have to be taken into consideration.

Television and radio cannot be controlled or financed by political parties or associations, local authorities or their associations, trade unions, or employer or professional associations; furthermore, radio broadcasting activity cannot be pursued directly or indirectly by the state, autonomous regions, local authorities or public institutions unless such activity is exclusively performed through the internet and consists of the organisation of institutional or scientific programme services.

Additional specific concentration and cross-ownership restrictions apply to television and radio activities. Concentration operations between media operators that

fall under the intervention of the Competition Authority are subject to a prior opinion of ERC that will be binding where there is deemed to be a risk to free expression and pluralism. Changes of control are prohibited during the first three years of the licence, and thereafter are subject to the prior consent of ERC. An undertaking also cannot hold more than 50 per cent of the licences for national unrestricted free-to-air television programme services, and there are cross-ownership restrictions with regard to radio both at the national and local level.

New rules on ownership, management and means of financing transparency are also in force for the media sector, including regarding television, radio, press and internet media content.⁶

According to the transparency principle:

- a* the shares of media entities must be registered shares;
- b* certain information, including direct, indirect and ultimate beneficiary ownership, and identity of the board members, the chief-editor and the auditor, must be notified to ERC;
- c* public disclosure is mandatory whenever there is a variation in the capital stock that meets 5, 10, 20, 30, 40 or 50 per cent of the share capital or of the votes, or if there is a change of control;
- d* shareholders' agreements, special financial movements and corporate governance rules have to be disclosed to ERC, and certain specific information about the shareholders must be published on the operator's website.

iv Transfers of control and assignments

Regarding the right of use of frequencies and numbers, the general rule is that such rights are transferable upon prior notification to Anacom, which may oppose the transfer or impose conditions in order to avoid distortion of competition. In this case, the Competition Authority shall give a prior opinion.

Licences and authorisations for television activity are non-transferable. Radio licences and authorisations at the local level are transferable, subject to the prior authorisation of ERC, without prejudice to the assignments granted by Anacom as the national communications regulatory authority and by the Competition Authority.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Internet services are regulated by the Electronic Communications Law⁷ and by the E-Commerce Law,⁸ and such activity is not subject to prior authorisation but only to prior notification to Anacom.

6 Law No. 78/2015 of 29 July entered into force on 30 October; see Section 1, *supra*.

7 Law No. 5/2004 of 10 February (as subsequently amended).

8 Decree-Law No. 7/2004 of 7 January (as subsequently amended).

Online intermediary service providers do not have an obligation to monitor the information that they transmit or store, or to investigate possible offences practised within their scope. However, in relation to the competent authorities, they shall:

- a* inform the authorities if they become aware of illegal activities undertaken via the services they render;
- b* comply with requests for identification of recipients of their services with whom they have entered into storage agreements;
- c* comply promptly with instructions aimed at terminating or preventing an offence, namely by removing or disabling access to given information; and
- d* supply lists of owners of hosted websites, when requested.

There have been no significant regulatory changes or improvements during the past five years with regard to internet and IP-based services. The guidelines issued by Anacom on VoIP date back to 2006, at which time a new 30 number range was created in the national numbering plan to accommodate nomadic VoIP numbers. Providers of VoIP services provided at a fixed location are subject to number portability obligations, but only within the 30 non-geographic numbering range.

ii Universal service

Currently, the following activities are covered by universal service obligations: fixed telephone services, public pay-telephones, and telephone directory and directory enquiries services; and the postal area, and radio and television.

The latest regulatory measures and financing lines for the development of the NGA networks date from late 2010. However, it is important to note that by December 2014, Portugal showed 100 per cent fixed broadband coverage and 89 per cent NGA coverage.⁹

iii Restrictions on the provision of service

As a general rule, prices are not regulated, but operators are subject to the obligation of the cost-orientation of prices. Anacom may intervene in cases of dominant position, and may require prices to be adjusted. For instance, in August 2015, Anacom ordered mobile operators in Portugal to cut the price of terminating calls on mobile networks by 35 per cent in order to increase competitiveness among smaller operators and make them more attractive to customers. There was also a recent intervention over customer retention and retail prices for portability operations so as to avoid market distortion.

Anacom also regularly issues guidelines regarding terms and conditions for end users, and operators must submit for approval all standard contracts with customers.

Unsolicited communications (e.g., automated calling machines, facsimile machines, e-mail, SMS, EMS, MMS and other similar applications) are subject to prior and explicit consent from the user (opt-in) unless the user is a legal person, in which case the opt-out rule applies.

⁹ Implementation of the EU regulatory framework for electronic communication – 2015, available at <http://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-126-EN-F1-1.PDF>.

Nevertheless, even in cases where the user is a natural person, unsolicited communications may not be subject to the user's prior and explicit consent, provided that:

- a* they are or have been in a business relationship with the user;
- b* the commercial communications are broadly the same or similar products or services previously supplied to the user;
- c* users were explicitly given the opportunity to opt-out from receiving unsolicited communications at the time their data were collected as well as at the time of each communication; and
- d* opting-out is simple and free of charge.

In addition, providers shall keep (themselves or through representative bodies) an up-to-date list of the natural users who opted-in to receive unsolicited communications as well as of users who did not object to receiving these, and of the legal users that opted-out.

iv Security

Freedom of access to information and self-expression are constitutional rights. Nevertheless, such rights can be limited under legally foreseen terms (e.g., judicial secrecy, state secrets). In addition, the electronic communications sector is ruled by the protection of privacy principle (Law 41/2004 of 18 August, subsequently amended by Law 46/2012 of 29 August, on the processing of personal data and the protection of privacy in the electronic communications sector that transposed Directives 2002/58/EC and 2009/136/EC). However, this protection of privacy rule has some exceptions, such as those that are strictly necessary for the protection of activities concerning public security, defence, state security, and the prevention, investigation and prosecution of criminal offences, under the terms established in special legislation.

Regarding the processing of personal data and the protection of privacy in the electronic communications sector, providers of publicly available electronic communications services shall:

- a* take appropriate technical and organisational measures to ensure the security of their services, and at least the following:
 - measures that ensure that personal data can be accessed only by authorised personnel, and only for legally authorised purposes;
 - protect personal data transmitted, stored or otherwise processed against accidental or unlawful destruction, loss, alteration, or unauthorised disclosure of or access to;
 - measures that ensure a security policy with respect to the processing of personal data;
- b* without undue delay, notify personal data breaches to the CNPD (the data protection authority) where such personal data breach is likely to adversely affect the personal data of the subscriber or user (where the breach could result in, for example, identity theft or fraud, physical harm, or significant humiliation or damage to reputation in connection with the provision and use of publicly available communications service); and to the subscriber or user in order to allow them to take any necessary precautions;

- c* ensure the inviolability of communications and related traffic data by means of public communications networks and publicly available electronic communications services, which means that any interception or surveillance of communications and related traffic data by persons other than the users is prohibited, without the prior and explicit consent of the users concerned, except for:
- cases provided for in the law (criminal procedures); and
 - any recording of communications and related traffic data legally authorised by the CNPD when carried out during the course of lawful business practice for the purpose of providing evidence of a commercial transaction, provided that the data holder has been informed thereof and given his or consent thereto;
- d* not store information or access information stored in the terminal equipment of a subscriber or user (e.g., cookies, web beacons) unless with his or her prior and informed consent, or if required for:
- carrying out the transmission of a communication over an electronic communications network; or
 - the provision of a service explicitly requested by the subscriber or user;
- e* erase or make anonymous traffic data relating to subscribers and users that have been processed and stored where they are no longer needed for the purpose of the transmission of a communication, except data strictly needed for billing purposes and only up to the end of the period during which the bill may lawfully be challenged or the payment pursued, unless with their prior, explicit and informed consent, which can be withdrawn at any time, and to the extent and for the duration necessary for the purpose of marketing electronic communications services or for the provision of value added services;
- f* process location data provided that they are made anonymous or, to the extent and for the duration necessary for the provision of value added services, with the subscribers' or users' prior, explicit and informed consent, which can be withdrawn at any time;
- g* reconcile the rights of subscribers receiving itemised bills with the right to privacy of call users and called subscribers;
- h* provide transparent, up-to-date information on the identification possibilities available regarding the calling line and connected line;
- i* following a prior opinion of the CNPD, when necessary, appropriate and proportional, and for a period not exceeding 30 days, provide the identity of a calling line to subscribers, on their written and duly substantiated request, when such subscribers wish to determine the origin of non-identified calls that upset the peace of their families or impact their private lives;
- j* ensure that any subscriber can, easily and free of charge, stop automatic call forwarding by a third party to such subscriber's terminal equipment; and
- k* inform subscribers or users before data are included in printed or electronic directories available to the public or obtainable through directory enquiry services, and collect their consent for such purposes, thereby allowing subscribers or users to choose which personal data they want to be displayed in such directories.

Retention of data that reveals the content of electronic communications is prohibited, without prejudice to those cases laid down in law and referred to above, as well as under criminal procedural law regarding the recording and interception of communications. Furthermore, under Law 32/2008 of 17 July (which implemented Directive 2006/24/EC), providers of publicly available electronic communications services or public communications networks must retain and transmit traffic and location data on both natural persons and legal entities, and related data necessary to identify subscribers or registered users for the purpose of the investigation, detection and prosecution of serious crime by the competent authorities. Under this Law, operators shall retain, for a one-year period, the following categories of data:

- a* the source of a communication;
- b* the destination of a communication;
- c* the date, time and duration of a communication;
- d* the type of communication;
- e* users' communication equipment; and
- f* the location of mobile communication equipment.

The retention and transmission of data that is exclusively intended for the investigation, detection and prosecution of serious crime by the competent authorities and the transmission of data may only be ordered or authorised through a reasoned court order. In addition, data intended for retention under the provisions of Law 32/2008 of 17 July must be stored separately from other files with different purposes, and (except for data on subscribers' names and addresses) must be blocked as from the moment they are retained, and only be unblocked in the event of transmission to the competent authorities.

There are no specific provisions regarding the online protection of children within Portugal's data protection laws. However, the CNPD and the Ministry of Education are aware of the need to educate children, teachers and parents on online privacy issues. As such, the CNPD, through Project Dadus, and the Ministry of Education in conjunction with other public and private entities, through Project SeguraNet, have developed several initiatives and resources to create awareness and train the educational community on how to protect children's privacy and their personal data to allow them to be safer online.

Cybersecurity concerns are growing, as indicated by the approval of the National Cybersecurity Strategy on 12 June 2015 (Council of Ministers Resolution 36/2015). In addition, the National Cybersecurity Centre was established (by Decree-Law No. 69/2014 of May 9) at the end of 2014 and became operational in October 2014. Its aims are:

- a* to implement measures and instruments for the anticipation and detection of, response to and recovery from imminent or occurring incidents or cyberattacks that undermine the functioning of state agencies, critical infrastructure and national interests; and
- b* pursue a strategy of prevention, raising awareness and educating organisations in particular and the public in general on issues of cybersecurity, thus contributing to creating a community of knowledge and a national culture of cybersecurity.

Also worth mention is the Cybercrime Law (Law 109/2009 of 15 September), which implemented Council Framework Decision 2005/222/JHA and establishes the

substantive and procedural criminal provisions, as well as the provisions on international cooperation in criminal matters related to cybercrime and the collection of evidence in electronic form.

IV SPECTRUM POLICY

There have been no significant regulatory or policy developments during the past two years regarding spectrum management.

Particular attention has been focused on DTT, with Anacom installing a network of probes to monitor the quality of the digital television signal and the DTT coverage. Anacom allocated a temporary network licence consisting of four new transmitters to solve problems detected by the probe network. Anacom and ERC have also jointly promoted a public consultation on the future of DTT.

Anacom has approved the methodology for setting and reviewing the reference speeds associated with coverage obligations in the 800MHz band.¹⁰

The last major initiatives regarding spectrum management were the refarming of the 900MHz band in 2010 and the multiband auction of 2011. The multiband auction allocated the rights of use for frequencies in the 450MHz, 800MHz, 900MHz, 1800MHz, 2.1GHz and 2.6GHz bands. The auction was launched following the memorandum of understanding, concluded on 17 May 2011 between the government and the International Monetary Fund, the European Central Bank and the European Commission, when possible distortions in the mobile electronic communications market were identified.

In August 2014, the first assessment of the mobile electronic communications market under the multiband auction regulation was published.¹¹

The main conclusions resulting from the assessment were that:

- a* the spectrum combinations of mobile network operators are very similar and do not lead to competitive distortions;
- b* the refarming process did not confer advantage to mobile network operators, because they all held rights of use for frequencies in equivalent amounts of spectrum in the 900MHz and 1800MHz bands; and
- c* the allocation of rights of use in the scope of the multiband auction did not contribute to creating distortions.

According to these conclusions, Anacom holds that there are currently no grounds for any regulatory intervention with regard to the allocation of spectrum, and spectrum is still available to allocate according to market needs.

10 Source: Anacom – Annual Report and Accounts 2014, available: www.anacom.pt/streaming/Relatorio_Contas2014.pdf?contentId=1363020&field=ATTACHED_FILE.

11 Available for consultation at www.anacom.pt/render.jsp?contentId=1324432&languageId=1#.VemveU9REuR.

V THE YEAR IN REVIEW

The government has updated its Digital Agenda through Resolution No. 25/2015 of 16 April in order to align it with the Digital Single Market Strategy for Europe and the Partnership Agreement for Portugal 2014–2020.

Key measures, all of which are to be implemented by 2020, are as follows:

- a* the development of broadband infrastructure to achieve 100 per cent national broadband coverage with speeds of not less than 30Mbps;
- b* the development of broadband infrastructure to allow 50 per cent of households to access broadband internet speeds equal to or greater than 100Mbps;
- c* the creation of conditions that allow an increase of 55 per cent in the number of companies using e-commerce in Portugal (compared with figures for 2011);
- d* the promotion among the Portuguese population of greater use of online public services to reach the European average;
- e* the creation of conditions that allow a 25 per cent increase in ICT exports in accumulated values (compared with figures for 2011); and
- f* the promotion of innovation in ICT, and the enhancement of R&D potential through a 10 per cent increase in direct public funding for ICT R&D (compared with figures for 2012).

VI CONCLUSIONS AND OUTLOOK

It is predicted that the government will focus on network neutrality, data security and privacy in 2016. It is also expected that the new Data Protection EC Regulation will receive final approval.

Appendix 1

ABOUT THE AUTHORS

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Jaime Medeiros graduated from the University of Lisbon, Portugal (1982). He has been elected ITechLaw local representative for Portugal (2010–2011); vice president of the Lisbon District Bar of the Portuguese Bar Association (2008–2010); counsellor to the General Council of the Portuguese Lawyers Pension Fund (2008–2010); member of the General Council of the Portuguese Bar Association (2002–2004); member of the Portuguese delegation at the CCBE (2004); member of the board of the Lisbon district of the Portuguese Bar Association (1991–1993); member of the special committee of company law CCBE (Council of the Bars and Law Societies of the EC); and president of the supervisory board of Fundação LIGA (since 2005). He was also a lecturer on civil procedural law and contracts law (1982–1986). He is an arbitrator for the arbitration centre of APDI.

Mr Medeiros has authored several articles and regularly speaks on legal issues from his practice. He is the co-author of *Commercial Agents in Europe* (John Wiley & Sons Ltd, 1996). He also co-authored the Portugal chapter of the 2011–2013 editions of *Getting the Deal Through – Telecoms & Media* (Law Business Research Ltd).

Mr Medeiros was recognised as an expert in IT by the 2013 edition of *Legal Experts*, an expert in internet, e-commerce and data protection by the 2013 edition of *Who's Who Legal* and an expert in outsourcing in the 2012/2013 edition of *PLC Which Lawyer*.

MÓNICA OLIVEIRA COSTA

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Mónica Oliveira Costa graduated from the Catholic University of Lisbon, Portugal (1999), and undertook subsequent postgraduate studies in consumer law (2004) and in IT law (2005), both at the Lisbon Faculty of Law. She is a member of the ITechLaw Association (since 2009) and of the International Association of Privacy Professionals

(IAPP) (since 2010). Within the IAPP, she has been the Portugal KnowledgeNet chair for Lisbon since 2012.

Ms Oliveira Costa has authored several articles and regularly speaks on legal issues from her practice. She wrote the Portugal chapter for the *Data Protection & Privacy* European Lawyer Reference Series (Thomson Reuters) (first and second editions, 2012 and 2014) as well as the Portugal chapter for *Getting the Deal Through – Data Protection & Privacy* (Law Business Research Ltd) (2013, 2014 and 2015 editions), and co-authored the Portugal chapter of *Getting the Deal Through – Telecoms and Media* (Law Business Research Ltd) (2011, 2012 and 2013 editions). She was a speaker at the Annual Europe Data Protection Intensive (2008–2011) as a representative and privacy expert of Portugal and also at the ITechLaw European conferences.

Ms Oliveira Costa has been recognised as an information technology leading private practice lawyer in Portugal by *Who's Who Legal* (2013, 2014 and 2015) and by *ExpertGuides* 2015.

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