INFORMATIVE NOTE

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY (TMT)

IMPORTANT CHANGES TO THE ELECTRONIC COMMUNICATIONS LAW

Law no. 51/2011 was published on 13 September and came into to force immediately on the following day. This law alters the legal rules on electronic communication networks and services for the sixth time. It also changes the definition of the powers of the regulatory authority in this area (Law no. 5/2004 of 10 February, or the "Electronic Communications Law/ECL")[1].

In parallel with a significant number of small changes (in particular, changes in terminology made in the interests of uniformity, updating of the applicable legal framework and correction of legal cross-references called for because of the renumbering of the legislation in question), the new law makes substantial changes to the legislation applicable to electronic communications. It is true that the revision of the legislation was done first of all to respond to the pressing need to transpose the European Directives adopted at the end of 2009 for the protection of consumers of electronic communication services and more efficient management of the spectrum. These Directives were justified by the objectives of strengthening independent regulation and consolidation of the internal market, specifically through the creation of the Body of European Regulators of Electronic Communications (BEREC). However, it is clear that the Portuguese legislator wanted to go further than simply achieving those objectives.

The following changes made to the rules merit our special attention:

1. The establishment, as a general rule, of the barring of added value services provided by message (SMS, MMS or similar) by the providers of these services. The generic or selective activation of such services is now dependent on written consent from the subscriber in question. This change did not appear in the draft law that was initially submitted to the Parliament but was added during the discussion and voting stages.

2. The establishment of new rules applicable to contracting, by either defining additional requirements as to the essential elements of the contract, or obligations as to its duration (such as making it impossible to make contracts for the provision of electronic communications services with consumers with an initial duration of greater than 24 months, it being a duty of communication service providers to offer all users

[1] The new Law transposes into Portuguese law Directive no. 2009/140/CE of the European Parliament and of the Council, of 25 November 2009, which amends Directive no. 2002/21/CE on the common regulatory framework for electronic communication networks and services ("Framework Directive"), Directive no. 2002/19/CE, on access and interconnection of electronic communication networks and related resources ("Access and Interconnection Directive") and Directive no. 2002/20/CE, on authorisation of electronic communication networks and services ("Authorisation Directive"), by Directive no. 2009/136/CE of the European Parliament and of the Council of 25 November 2009, insofar as it amends Directive no. 2002/22/CE, on universal service and user rights in electronic communication networks and services ("Service Universal Directive").

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the possibility of making contracts with a duration of 12 months). In this respect, also worthy of note is the end of the requirement to send service agreement contracts to ICP-ANACOM for approval. Companies that provide electronic communication services are now required to deposit one copy of the contracts agreeing the general contractual clauses with ICP-ANACOM and the Directorate-General of the Consumer, within a maximum of 2 days from the start of the service, (without prejudice to the possibility of ICP-ANACOM subsequently determining the termination of use of the contracts with immediate effect if they find any unlawful provisions in them).

3. Equally important are that changes to the area of frequency use rights, in particular as regards the respective duration, renewal and transfer conditions. The attribution of rights of use is now made for the minimum period of 10 years. As regards the process for the renewal of rights of use, ICP-ANACOM has 6 months to give its response as part of a general consultation procedure. It may i) oppose, ii) approve the request under the same conditions, or iii) approve the request under different conditions. In any event, silence will be construed as tacit approval. The transferability of rights of use will be the rule from now on (under the previous rules, transfer was always dependent on authorisation from the ARN). Alongside transfer it is now possible for companies to lease frequencies to each other. The rights holders must give notice of their intention to transfer and lease frequencies and the conditions under which they intend to do so to ICP-ANACOM, and the regulator – if it intends to oppose or impose conditions – must give its decision within 45 days (after a prior opinion from the Competition Authority).

4. The section relating to the issues of the security and integrity of networks and services is completely new and has placed an obligation on companies providing network services to adopt technical and organisational measures appropriate to the prevention and reduction of risks to the security of the networks so as to guarantee their integrity and also technical measures for execution and other additional requirements to be determined by ICP-ANACOM, specifically in the context of laying down binding instructions. The new law also provides that companies are under an obligation to notify the regulator of any security breaches or lapses in integrity with a significant impact on the functioning of the networks and services. ICP-ANACOM can also order companies to carry out security audits of the respective networks and services at their own expense.

5. The applicable rules on sanctions have also suffered important changes following what was already provided in the framework rules on regulatory offences in the electronic communications sector approved Law no. 99/2009 of 4 September. Although it essentially retains the same range of applicable fines (a minimum of €100 and maximum of €5 000 000), there is now a clear distinction between different types of regulatory offences (minor, serious or very serious) and, within each one, between the form applicable to individuals and micro, small, medium-sized and large companies.

6. There are also changes in respect of the time limits to be applied, specifically in respect of:

i) the communication obligation imposed on companies wanting to cease offering networks and services, where a minimum notice of 15 days is established to comply with the obligation;

ii) rights of way, in relation to which it was established that no more than 6 months can pass between the date of presentation of the request for use of the public domain to install systems, equipment and other resources and the decision on the request (except in cases of compulsory purchase proceedings);

iii) breach, where we have seen a reduction in the deadline for making a decision for companies from one month to 10 days. It is also established that after the respective hearing/decision, for the purposes any requirement to terminate the breach, the ARN may determine the application of compulsory financial sanctions or issue orders for termination or suspension of the provision of services, and it must communicate any such decisions within 2 days;

iv) universal service providers, who are now under an obligation to give at least 90 days' notice to the regulator of the assignment of the whole or a substantial part of the assets of a universal service provider's network. The identification of the beneficiary of the assignment and the contractual terms and condition of the assignment must also be communicated to the regulator; and

v) the period of 30 days which is established for the attribution of frequency use rights in the case of full accessibility and one of 8 months to communicate and advertise the decision in the case of selection procedures.

7. A trend towards strengthening the obligations to publish and provide information has also been observed. This is expressed in the fact that ICP-ANACOM can require operators to provide additional information to subscribers (for example, prices applicable to communications to specific number or services subject to special rates, any change in access to emergency services or in the availability of information on the location of the person making the call, any change in the conditions restricting the use of services and applications, etc.). In this respect, it should be emphasised that the information provided by the companies can now be used for interactive guides or other mechanisms to provide information to consumers.

8. In the context of mechanisms for preventing contracts from being made which allow subscribers who have not met their payment obligations under contracts to be identified, companies must now guarantee that:

i) subscribers are given at least 5 days' notice allowing them to remedy the breach before

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including the subscriber's data in the database;

ii) subscribers' details are removed immediately after payment or when the credit is lower than the legally established amount (please note that the criterion was changed by substituting the reference to the national minimum salary with 20% of the minimum guaranteed monthly income); and

iii) data relating to subscribers who have presented proof that they have observed the contract is not included.

9. On the issue of market analysis, the question of the existence of a position of joint dominance sees important changes. From now on, the regulator can deem that two or more companies enjoy a position of joint dominance when, regardless of the existence between them of structural or other relationships, "they operate in a market characterised by lack of effective competition and in which no common company has significant market power" (remembering that in the previous version of the ECL the legislator made reference to companies that "operate in a market the structure of which is considered to be conducive to coordinated effects"). The factors to be taken into consideration to determine the existence a position of joint dominance have also suffered changes with the elimination of a number of paragraphs and the inclusion of an express reference to "vertical integration with collective refusal to supply".

10. Also deserving of our attention is the express provision of the possibility for the regulator to impose an obligation of functional separation on companies with significant market power, whenever the obligations already established have not made it possible to guarantee effective competition and competition problems or market failures that are relevant in relation to the wholesale supply to specific markets of access products persist. In this case, the company must present in advance a well-founded proposal and a draft decision to the European Commission.

11. The legislator also saw fit to regulate what is known as "voluntary functional separation", by establishing the obligation for vertically integrated companies deemed to have significant market power to give advance and timely notice to ICP-ANACOM whenever they intend to transfer their local access network assets, or a substantial part of them, to a separate legal entity under different ownership or to establish a separate corporate entity to offer fully equivalent access products to all retail suppliers including their own retail divisions.

12. Another aspect that characterises the new wording of the ECL lies in the widening of the protection offered to consumers. For example, in respect of cost control, there is now obligation to provide a rates advice service that allows subscribers to obtain information on possible alternative lower or more advantageous rates. Companies must also offer the possibility of controlling telephone service costs including free alerts to customers with abnormal consumption patterns. These protections are aimed, in particular, at users with disabilities for whom companies must now adopt measures aimed at providing them with a service equivalent to that provided to other users.

13. Finally, we would refer to the changes made in respect of the obligations to publicise actions and information, which must now be published on the Internet site rather than in Diário da República (the official gazette) and the approval of a new Annex I covering service quality parameters;

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