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Maria Teresa Silva

Untitled (from the séries Looping) , 1999

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Editorial

Regulation and self-regulation in the telecommunications sector

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The telecommunications sector is nowadays one of those sectors in which its regulation assumes a larger presence and visibility at a national level, as well as at European and international levels.

In fact, rare is the week – if not the day – when agents of the sector are not confronted with the adoption, by the different regulatory authorities of the sector, of decisions that have a significant impact for the activity undertaken by telecommunications operators and for market conditions.

In parallel, competition authorities have shown a particular craving for this sector, which has only very recently been opened up to competition and in which, as is well known, the incumbent operators still have a significant influence.

In Portugal, the activity of the regulatory authority of the sector- "ICP - ANACOM – Autoridade Nacional de Comunicações" (ICP – ANACOM – National Communications Authority) - completely falls within the panorama described above, which is easily shown by the abundant adoption of resolutions and regulations and by the constant monitoring of the market. In what concerns the competition regulatory authority – the Competition Authority – it has had a less significant activity in Portugal when compared with the most important European counterparts, which is also certainly explainable due to its recent creation.

A lot has been lately said and written in a more or less critical or more or less laudatory manner with regard to the activity – and its effects – of the regulatory authorities in what regards the competition conditions of the national telecommunications market. I will return to this subject at another time.

The question that I have chosen to approach is a different one: does the almost omnipresence of the regulatory authority mean that it is exclusively entrusted – or should be entrusted – with the definition of the market regulation instruments? In other words: is there room for self-regulation in markets subject to sector specific regulation?

This question is placed with reference to the recent agreement – which was widely reported by the media – entered into between Portugal Telecom, Sonaecom and ONI for the simplification of the procedures applicable to the change of a service provider whenever requests of alteration or termination of contracts exist in the framework of a request for the unbundling of the local loop, of re-rental of the unbundled local loop, of portability or of pre-selection.

This issue, as is well known, is subject to unsatisfactory and excessively bureaucratic rules, and in fact constitutes a significant impediment for the development of broadband in Portugal.

By entering into the referred agreement, operators have shown that it is possible to find "marginal" solutions to the "official" sector specific regulation and have opened a door that until then was practically closed.

This type of agreement seems to be perfectly valid from a legal point of view insofar as they do not contradict mandatory public law rules. However, the boundary is not always easy to determine …

In the meanwhile, the regulatory authority has communicated to operators the "probable orientation" of a resolution that has as its object precisely the procedure of termination of contracts under the scope of the offer of access to the local loop.

In the event the final resolution provides for different procedures to those that the operators have created in the abovementioned agreement, will the operators concerned be prevented from complying with the agreement in the part whereby the agreement diverges from the solutions contemplated in the resolution?

Or, on the contrary, should the resolution be interpreted as constituting a "minimum standard" which will not prevent the operators from agreeing, among themselves, on solutions that are more efficient with handling contract termination procedures?

I think that a positive answer to the second option should be imposed. In the first instance, for legal reasons, but also because it is a solution that is reasonable and in good sense. And the law should be an instrument that is reasonable and reflects good sense. ▪

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Renewal of Licences of Mobile Operators

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By resolution of ANACOM – Autoridade Nacional de Comunicações (ANACOM – National Communications Authority), of July 15th, 2005, the launching of a public consultation was approved, which is to be made under the scope of the renewal of rights of use attributed to VODAFONE PORTUGAL and TMN for the rendering of the mobile communications services in accordance with the GSM 900/1800 system (Global System for Mobile Communications), the deadline of 30 working days having been determined for interested parties to state their opinion. By resolution of July 28th, 2005, the deadline for reply to the public consultation was extended until September 15th.

This consultation is inserted within the context of the renewal of licenses of the mobile operators. The licenses of the three land mobile service operators - TMN, Vodafone and Optimus – have a validity period of 15 years. The license of Vodafone expires in October, 2006. The license of TMN expires in 2007, whilst the license of Optimus only expires in 2012.

Under a legal point of view, the renewal of licenses is equivalent to the issuance of new licenses and therefore ANACOM may alter its contents. However, the legal framing now in force – which will be applicable to the renewal – is substantially different to the legal framing that was in force at the time of concession of the respective licenses.

In fact, under the terms of the Law on Electronic Communications, approved by Law nr. 5/2004, of February 10th, the principle of free provision of services is applicable. This means that ANACOM can only impose the conditions set forth in that law to the operators. On the other hand, only the right of use of frequencies (radio spectrum) depends on the attribution of individual rights of use.

Notwithstanding, ANACOM stated in its press release of June 15th, 2005 that:

> *"The regulator intends to take advantage of the renewal of licenses in order to better safeguard the interests of the consumer, for instance by reinforcing their coverage obligations and by defining quality of service indicators for their data services.*
>
> *It is the understanding of the regulator that further aspects may still be taken into account within the scope of the process of renewal of licenses of mobile operators, such as definition of conditions for the secondary spectrum commerce, the definition of tariffs applicable to the renewal of rights of use of mobile operators and the obligations regarding access and interconnection resulting from the declaration of GSM operators with SMP (significant market power)."*

Mobile communications services are very important within the context of the Portuguese economy. The mobile communications market is the only market of the electronic communications sector where there is a high level of competition. In addition, Portugal has a very significant number of mobile lines at a world level, presently approximately 95% in relation to the total population. It should be noted that the average penetration rate of the European Union is of 88%.

This market is also very important within the specific context of regulation of the sector. In fact, the use rates of radio spectrum, charged by ANACOM to the three mobile operators, represents the largest financing source of its activity (approximately 70 million Euros per annum, which corresponds to approximately 60% of ANACOM's income).

Among the aspects that ANACOM proposes to analyse, the most interesting are clearly the admission of collecting a fee for renewal and the definition of the conditions of the secondary spectrum commerce.

The collecting of a fee for renewal will be an innovation. The present licenses were granted without the collection of such a fee. The only fees that operators are subject to are administrative fees related with the license (issuance and annual fee) and the fees for use of the spectrum.

Besides, the same occurred with all licenses attributed by ANACOM, with the exception of the UMTS (Universal Mobile Telecommunications System) licenses. In this particular case, a fee of 100 million Euros was charged to each operator. Thus, considering the troubled experience of the UMTS licenses and the fact that the fees for use of the spectrum are presently so high, it cannot be conceived that ANACOM may impose significant renewal fees.

As concerns the secondary spectrum commerce, it is a question broadly discussed and in relation to which ANACOM never issued a definitive position. What is at stake is the possibility of operators selling spectrum or conferring rights of use of spectrum to third parties. This method would allow the present operators to find a new form to obtain income and would allow third parties to enter the mobile communications market. This possibility may be an interesting form to increase the levels of competition and innovation of this market.

Due to the importance of the mobile communications market, this public consultation should be extensively publicized and amply participated. ▪

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The New Trademarks of the Mobile Operators

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The operators of mobile communications services have recently launched new service trademarks on the market, which are aimed at a target-audience that essentially (when not exclusively) valorises the services of telephone calls and SMS (Short Messaging Service).

Specifically, TMN launched "UZO", Optimus launched "Rede4" and Vodafone launched "Vodafone Directo".

The announced market saturation – it should be noted that the penetration of the mobile service is presently of around 95% in relation to the total population – and the announced entry in the market of virtual operators (MVNOs) may explain the presentation of this alternative to consumers who are more interested in a price reduction of the services.

An especially interesting particularity of these new services, within the context of the enormous complexity of the offer currently available, is the apparent "step back" to 2nd generation services.

In fact, although the operators concerned already provide 3rd generation services – which, supported on the UMTS (Universal Mobile Telecommunications System) network, permits video-calls, access to the internet, interactive services, etc. – the new "trademarks" offer their services exclusively supported on the GSM (Global System for Mobile Communications) network – 2nd generation, particularly focusing on more accessible tariffs.

This phenomenon, which demonstrates the very competitive nature of this market, may raise some interesting questions related with the regulation of the sector and with the consumer right.

Notwithstanding the fact that the services are of the responsibility of the operators actually present in the market, in two of the cases – Uzo and Rede 4 – the new trademark does not contain any element that permits consumers to associate the service to the operator (TMN and Optimus) which effectively provides such service. In the case of Optimus, the trademark itself "Rede4" suggests the existence of a new operator (literally "a fourth network").

From a regulatory point of view, assuming that it is the three operators that directly provide the services, it seems clear that the new service trademarks do not imply the obtaining of new licenses, considering that these are included in the GSM licenses already held by them.

However, if the service were provided by a different company (even if within the same economic group), the question would cease to be evident. In this situation, Articles 19 and 21 of the Electronic Communications Law ("ECL"), approved by Law nr. 5/2004, of February 10th, would be applicable, according to which the offer of electronic communications networks and services is subject to the general authorisation regime, which, although does not imply any decision or previous act by the national regulatory authority, ANACOM, still requires the prior remittance to that authority of a description of the type of service set forth in the offer as well as a description of its identification elements.

On the other hand, although these new services resort to the right of use of the licensed operators (such as right of use of numbers, already existing interconnection agreements and use of frequency bands already attributed to the original operators), these new services do not cease to also be subject to the conditions of attribution of GSM frequencies for mobile communications , set forth in the Vodafone, Optimus and TMN licenses.

This means that eventual commitments contemplated in the licenses must be assured in relation to the new trademarks (this is, by the operators that launched the new trademarks), as is the case of the portability guarantee of the operator – this is, the functionality through which the final users who so request may maintain their number(s), independent of the operator that offers the service. In this respect, doubts may arise on the question of knowing if the attribution of a specific number for that service, besides the prefix that identifies the operator (9X), is compatible with the obligations of portability.

Finally, from a consumer advertising law perspective (within the specific scope of the principle of compliance with consumer rights), the correct identification of the provider of services of the trademarks under analysis should be examined. In fact, there are several provisions that aim to protect the consumer regarding the obligation of a complete identification of the provider of services, namely in a form that permits the consumer to have a clear idea of the entity responsible for the quality of the service provided to him.

The protection of telecommunications consumers is also a task of the national regulatory authority, ANACOM, which should, for instance, previously approve the electronic communications service standard contracts, submitting them for the prior opinion of the Consumer Institute (check Article 39, nr, 4 of the ECL). Moreover, the use of standard form contracts without the prior approval of ANACOM is an administrative offence punishable with a fine (of €5.000,00 to €5.000.000,00, in the case of companies), under the terms of the provisions of sub-paragraph t) of nr. 1 and nr. 3 of Article 113 of the ECL).

In conclusion, the option by traditional operators to create new trademarks seems mainly to satisfy a desire to enlarge its market base, wagering on the offer of more differentiated services. In fact, the new services presented are, from a regulatory perspective , subject to precisely the same conditions and obligations as those assumed by the operators. In practice, it is the creation of new tariffs associated to a trademark which main objective is apparently to privilege the conquest of a range of consumers to whom the price factor excels over the level of services provided by growing technological innovation.

Therefore, it may be expected that the option of the consumer to this new type of services deserves the particular attention of the national regulatory authority, namely, as concerns the specific conditions of the proposed service and also the possibility of identification of the provider of services. ■

SPAM – The Problem of Junk Mail That Invades Our E-mail Boxes on a Daily Basis

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Any person who regularly uses e-mail has already certainly been faced with the problem of *spam*. *Spam* is a term used to describe unsolicited e-mail messages, normally sent with a commercial aim. There are innumerous companies that actually use the e-mail extensively to promote its products and services.

When the quantity of messages is significant, *spam* can disturb the activity of the user. In extreme cases, *spam* can block e-mail boxes and prevent their operation.

The term *spam* comes from an episode of the television series "Monty Python's Flying Circus" which ends by all participants shouting *spam* in an uncontrolled manner. The idea is that the Internet will exclusively be used for sending this type of communication if the sending of unsolicited messages is not controlled.

In Portugal, there is specific legislation applicable to *spam*. Article 22 of Decree-Law nr. 7/2004, of January 7th, governs this subject, implementing Article 13 of Directive 2002/58/EC, of July 12th, 2002, regarding the treatment of personal data and the protection of privacy in the electronic communications sector.

This rule differentiates between messages sent to individuals and to companies. It should be noted that a message sent to an individualized mail box of a company (for example, **nameofperson@name of company.pt**) will be considered as being sent to a company.

In the case of messages sent to individuals, it is obligatory that prior consent of the addressee is previously obtained. This consent will always have to be specific for each entity interested in sending this type of messages.

In the case of messages sent to companies, the addressee may indicate that it does not wish to receive future messages.

In any case, the message must contain an address and electronic means that permit the addressee to refuse the sending of these messages in the future. There is additionally the obligation to create an up-dated list of persons who do not intend to receive this type of communications, and the sending of messages to these persons is thus prohibited . This list has still not been created.

The only exception to this regime refers to suppliers of products and services who can send messages to their clients, provided that the possibility of refusal has been explicitly offered at the time of realisation of the transaction.

The posting of unsolicited communications in breach of the rules described consists of an administrative offence, punishable with a fine of up to € 50.000,00.

This regime has important restrictions related with the nature of the Internet itself. The most important restrictions are the lack of transparency of many messages posted and the international nature of the Internet.

As concerns the first, it is relatively easy for the sender to hide his identity through the use of phantom addresses. As a consequence, the addressee does not know how to react or to how to make a complaint. The second restriction is of a legal content. A company located outside the European Union (the regime is equivalent in all countries of the European Union) is not bound by this set of rules. Thus, a relevant number of companies that use *spam* are established in the United States of America.

For this reason and as is occurring within the context of the protection of copyright , the forms of reaction to combat this type of illegal act are more and more frequently through measures of a technological character. In this sense, computer programmes destined to prevent the receipt of *spam* (that operate as filters) are more frequently appearing on the market.

Notwithstanding, companies established in Portugal that intend to promote their products and services through e-mail messages must comply with the regime set forth in Article 22 of Decree-Law nr. 7/2004. Additionally, within the context of the unease created between the users by companies in breach of these rules, companies must be extremely careful in the form how they comply with their obligations in respect to obtaining the consent of the addressees and to offering the possibility for their clients to refuse future unsolicited communications. ■