

Telecoms and Media

An overview of regulation
in 52 jurisdictions worldwide

2009

Consulting editors: Rachel Brandenburger and Natasha Good



Published by
Global Competition Review
in association with:

Al Kamel Law Office
Barretto Ferreira Kujawski Brancher e Gonçalves Sociedade de Advogados (BKBG)
Blake, Cassels & Graydon LLP
Bowman Gilfillan Inc
Carey y Cía Ltda
Cocalis & Psarras
Coulson Harney
Dimitrov, Petrov & Co
Drakopoulos Law Firm
Drew & Napier LLC
F J & G De Saram
Freshfields Bruckhaus Deringer
Gatt Tufigno Gauci Advocates
González Calvillo SC
Harris Kyriakides LLC
Henry Davis York Lawyers
Hergüner Bilgen Özeke
Holland & Knight LLP
Lavrynovych & Partners law firm
Lenz & Staehelin
LG@vocats
Majmudar & Co, International Lawyers
Mannheimer Swartling
Matheson Ormsby Prentice
Moreno Baldivieso Estudio de Abogados
Nielsen Nørager
Palacios Ortega y Asociados
Pierstone
PLMJ
Pradhan & Associates
PRK Partners
Sycip Salazar Hernandez & Gatmaitan
Udo Udoma & Belo-Osagie
Wierzbowski Eversheds
Wigley & Company
Wong Jin Nee & Teo
Yangming Partners
Yulchon
Zang, Bergel & Viñes Abogados



Telecoms and Media 2009

Consulting editors:

Rachel Brandenburger and
Natasha Good

Business development manager

Joseph Samuel

Marketing managers

Alan Lee
Dan Brennan
George Ingledew
Edward Perugia
Robyn Hetherington
Dan White
Tamzin Mahmoud
Elle Miller

Marketing assistant

Ellie Notley

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistants

Nick Drummond-Roe
Charlotte North

Senior production editor

Jonathan Cowie

Subeditors

Jonathan Allen
Kathryn Smuland
Sara Davies
Laura Zúñiga
Ariana Frampton
Sarah Dookhun

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Telecoms and Media 2009

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2009

No photocopying: copyright
licences do not apply.

ISSN 1471-0447

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2009, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law
Business
Research

Global Overview Rachel Brandenburger, Connie Carnabuci and Natasha Good <i>Freshfields Bruckhaus Deringer</i>	3
Argentina Pablo Crescimbeni, Paola R Feliciotti and Ivana Blumensohn <i>Zang, Bergel & Viñes Abogados</i>	7
Australia Robert Neely and Peter Mulligan <i>Henry Davis York Lawyers</i>	15
Austria Bertram Burtscher and Stefan Köck <i>Freshfields Bruckhaus Deringer</i>	27
Belgium Laurent Garzaniti and Jan Blockx <i>Freshfields Bruckhaus Deringer</i>	38
Bolivia Andres Moreno Gutierrez <i>Moreno Baldovino Estudio de Abogados</i>	48
Brazil Ricardo Barretto Ferreira da Silva and Fabio Ferreira Kujawski <i>Barretto Ferreira Kujawski Brancher e Gonçalves Sociedade de Advogados (BKBG)</i>	54
Bulgaria Miroslav Ognyanov and Veneta Donova <i>Dimitrov, Petrov & Co</i>	61
Canada David Kidd, Andrée Wylie, Sunny Handa and Tricia Kuhl <i>Blake, Cassels & Graydon LLP</i>	71
Chile Alfonso Silva and Eduardo Martin <i>Carey y Cía Ltda</i>	83
China Connie Carnabuci, Xun Yang and Christy Baker <i>Freshfields Bruckhaus Deringer</i>	93
Cyprus Michalis Kyriakides <i>Harris Kyriakides LLC</i>	106
Czech Republic Tomas Schollaert <i>Pierstone</i>	112
Denmark Henrik Peytz, Jakob Mosegaard Larsen and Michael Jørgensen <i>Nielsen Nørager</i>	120
Egypt Mohamed Hashish <i>Al Kamel Law Office</i>	127
European Union Rachel Brandenburger, Thomas Janssens and Tomas Savickas <i>Freshfields Bruckhaus Deringer</i>	135
France Jérôme Philippe and Aude-Charlotte Guyon <i>Freshfields Bruckhaus Deringer</i>	155
Germany Norbert Nolte and Annegret König <i>Freshfields Bruckhaus Deringer</i>	166
Greece Alkiviadis Psarras <i>Cocalis & Psarras</i>	176
Hong Kong Connie Carnabuci, Margaret Wang and Sara Brooks <i>Freshfields Bruckhaus Deringer</i>	184
India Anoop Narayanan and Priyanka Gupta <i>Majmudar & Co, International Lawyers</i>	199
Ireland Helen Kelly and Ciara Treacy <i>Matheson Ormsby Prentice</i>	205
Italy Tommaso Salonico and Luca Ulissi <i>Freshfields Bruckhaus Deringer</i>	222
Japan Mariko Kobayashi and James Wood <i>Freshfields Bruckhaus Deringer</i>	232
Kenya Richard Harney and Angela Waki <i>Coulson Harney</i>	241
Korea Hyung Jin Kim, Kum Ju Son, Seung Hyuck Han and Kyu Hyun Kim <i>Yulchon</i>	248
Luxembourg Stephan Le Goueff and Erwin Sotiri <i>LG@vocats</i>	260
Malaysia Jin Nee Wong <i>Wong Jin Nee & Teo</i>	266
Malta Ian Gauci <i>Gatt Tufigno Gauci Advocates</i>	276
Mexico Jorge Cervantes and Pedro Resendez <i>González Calvillo SC</i>	284
Nepal Devendra Pradhan <i>Pradhan & Associates</i>	292
Netherlands Onno Brouwer, Winfred Knibbeler, Kees Schillemans and Nima Lorjé <i>Freshfields Bruckhaus Deringer</i>	301
New Zealand Michael Wigley <i>Wigley & Company</i>	309
Nigeria Myma Belo-Osagie, Jumoke Lambo and Ngozi Oyolu <i>Udo Udoma & Belo-Osagie</i>	316
Philippines Rose Marie M King-Dominguez and Ruben P Acebedo II <i>Sycip Salazar Hernandez & Gatmaitan</i>	325
Poland Arwid Mednis, Bożena Marciniak and Artur Salbert <i>Wierzbowski Eversheds</i>	331
Portugal Luís Miguel Pais Antunes <i>PLMJ</i>	340
Romania Adrian Roseti and Marina Dranga <i>Drakopoulos Law Firm</i>	347
Russia Jacky Baudon, Leonid Sedov and Roman Churakov <i>Freshfields Bruckhaus Deringer</i>	353
Saudi Arabia Fares Al-Hejailan and Gerald Steinke <i>Freshfields Bruckhaus Deringer</i>	369
Singapore Chong Kin Lim and Wei Hao Loh <i>Drew & Napier LLC</i>	378
Slovakia Peter Oravec <i>PRK Partners</i>	394
South Africa Daniel Pretorius and Livia Dyer <i>Bowman Gilfillan Inc</i>	402
Spain Francisco Cantos and Margarita Fernandez <i>Freshfields Bruckhaus Deringer</i>	411
Sri Lanka Priyanthi Guneratne and Harini Udugampola <i>F J & G De Saram</i>	421
Sweden Biörn Riese, Alexander Berger and Martin Gynnerstedt <i>Mannheimer Swartling</i>	428
Switzerland Marcel Meinhardt and Astrid Waser <i>Lenz & Staehelin</i>	436
Taiwan Robert C Lee <i>Yangming Partners</i>	444
Turkey Technology, Media & Telecommunications Group <i>Hergüner Bilgen Özেকে</i>	452
Ukraine Iryna Marushko, Anton Lukovkin and Olena Trapeznikova <i>Lavrynovych & Partners law firm</i>	462
United Kingdom Rachel Brandenburger, Rod Carlton, Mark Sansom and Manish Das <i>Freshfields Bruckhaus Deringer</i>	473
United States Norm Leventhal, Charles Naftalin, Eric Fishman, George Wheeler, Peter Connolly, Roz Allen and Ron Oleynik <i>Holland & Knight LLP</i>	489
Venezuela Arturo H Banegas Masiá and Adolfo Ledo Nass <i>Palacios Ortega y Asociados</i>	499
Quick Reference Tables	506

Portugal

Luís Miguel Pais Antunes

PLMJ

Communications Policy

1 Policy

How would you summarise government and regulatory policy for the telecoms and media sector? What is the policymaking and policy development procedure? Has the EU regulatory framework (including the market reviews) been fully transposed into your national law?

Telecoms and media are viewed from a policy perspective as two separate sectors. Accordingly, the responsibility for these sectors belongs to different government bodies and two independent regulatory authorities. Telecoms are handled by the Ministry for Public Works, Transport and Communications while media is handled by the Presidency of the Council of Ministers. Telecoms are regulated by ICP-ANACOM (National Communications Authority) and media by the newly established ERC (Entity for the Regulation of the Media) created in 2006.

The two independent regulatory authorities are vested with the responsibility of policy making and development, in accordance with EU directives and the reality of Portuguese markets. The government has general policy and legislative responsibilities. However, the main drivers are the regulatory authorities.

Liberalisation of the telecoms sector occurred on 1 January 2000. The main act is the Electronic Communications Law, Law 5/2004, of 10 February (ECL), which fully transposes the EU regulatory framework.

The market review process is still incomplete. ICP-ANACOM concluded its analysis of the wholesale market of broadcasting services for the delivery of content transmitted to final users (Market 18) on 2 August 2007, and approved, on 14 January 2009, a final decision on the definition of the product and geographic markets, SMP assessment and the imposition, maintenance, alteration or suppression of regulatory obligations with respect to the markets for wholesale (physical) network infrastructure access at a fixed location and wholesale broadband access (Markets 4 and 5). Portugal also reviewed an additional market (calls to fixed non-geographical numbers), as well as Market 12. Markets 15 and 17 have not yet been reviewed.

Regarding the media sector, major laws are the Television Law (Law 27/2007, of 30 July), the Radio Law (Law 4/2001, of 23 February, as amended by Law 7/2006, of 3 March) and the Press Law (Law 2/99, of 13 January, as amended by Law 18/2003, of 11 June).

2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

No, convergence is still mainly a buzzword. The sectors are currently subject to distinct and separate regulation. The terms 'telecoms' and 'media' do not correspond to legal definitions.

3 Broadcasting sector

Is the broadcasting sector or content regulated separately from telecoms?

The media (broadcasting and content) sector is regulated separately from telecoms and subject to regulation from a separate regulatory authority, the ERC.

Telecoms regulation

4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

Yes, Portugal is part of the WTO Basic Telecommunications Agreement. The schedule for Portugal had some special rules regarding the liberalisation timetable and foreign shareholding limitations in telecom infrastructures. However, these rules are no longer in effect.

5 Public/private ownership

What proportion of the stock of any incumbent operator is in the ownership of the state or private enterprise?

The incumbent operator – Portugal Telecom – is currently a listed company. The government controls directly and indirectly around 6 per cent of the stock of the company. The government also controls a 'golden share' (500 shares that have certain veto rights attached). The Commission of the European Communities brought on 25 April 2008 in the European Court of Justice an action against Portugal, because it considered that by maintaining special rights for the State and other public bodies in Portugal Telecom SA, attributed in connection with the State's golden shares (preferential shares) in Portugal Telecom SA, Portugal has failed to fulfil its obligations under articles 56 and 43 EC.

6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide any telecoms services?

There are no foreign ownership restrictions to providing telecoms services.

7 Operator exclusivity

Does any operator have exclusivity, and, if so, for which services, and for how long?

There are currently no legal exclusivity rights.

8 Fixed, mobile and satellite services

Comparatively, how are fixed, mobile and satellite services regulated? Under what conditions may publicly available telephone services be provided?

The ECL sets forth the general authorisation regime for all telecoms services: the interested providers must send to ICP-ANACOM a description of the service they want to provide, and will then be subject to certain conditions, such as interoperability of services, access granting obligations, maintenance of the integrity of the networks, interception of communications, personal data protection and payment of fees.

ICP-ANACOM is bound to issue, within five days from the reception of said description, a certificate of delivery, describing the rights of the provider in regard to access and interconnection, and resources installation.

Individual rights of use are only required for numbering and radio spectrum resources.

9 Satellite facilities and submarine cables

In addition to the requirements under question 8, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

There are no specific requirements for satellite earth station facilities or for the landing of submarine cables. The relevant requirements – radio frequency licensing, building permits, right to use the public domain – are applicable to all operators and services.

10 Radio frequency (RF) requirements

For wireless services, are radio frequency (RF) licences required in addition to any telecoms services authorisations and is an RF licence available on a competitive or non-competitive basis? Are RF licences allocated using auctions or other procedures? Is licensed spectrum tradable in any circumstances?

Use of radio frequencies is subject to individual rights that must be obtained from ICP-ANACOM. Additionally, radio frequency networks and each radio base station are subject to specific licences.

Regarding radio spectrum management, ICP-ANACOM grants the frequencies in accordance with the following criteria: availability of spectrum, guarantee of effective competition in the relevant market and effective and efficient use of the frequencies.

For this purpose, ICP-ANACOM annually publishes the National Plan for Frequency Attribution (NPFA), which contains: the frequencies already attributed, frequencies reserved and to be attributed during the following year, specifying the respective attribution procedure and the frequencies which rights of use are susceptible of being transferred. Rights to use frequencies must always be granted through open, transparent and non-discriminatory procedures, and are normally valid for 15 years.

11 Third generation services

Is there any regulation for the specific roll-out of third generation mobile services?

A public tender procedure for the attribution of third generation licences was launched in 2000. There were four licences available to operate in IMT2000/UMTS, which were granted to TMN, Vodafone, Optimus and Oniway (this fourth licence was later revoked, in January 2003, as Oniway decided to withdraw from the market; the spectrum was therefore granted to the other three mobile operators). As there was no infrastructure available, commercial launch was postponed until January 2004. Operators were then bound to achieve national coverage of 20 per cent in the first and second year,

40 per cent in the third and fourth year and 60 per cent at the end of the fifth year.

12 Fees

What fees are payable for each type of authorisation?

On 17 December 2008, Administrative Rule 1473-B/2008, approved new fees. This act establishes six distinct types of fees:

- A one-off fee for issue of declarations regarding start of service provision of €700 (changes to the declarations are subject to a one time fee of €70).
- A one-off fee for the issue of individual rights of use for radio frequencies, which depends on the type of proceeding applicable to the grant of the individual rights of use. If the rights of use are granted through a public tender or an auction procedure, each procedure will specify the applicable fees. These fees are in any case calculated in accordance with the administrative costs incurred by the regulator in managing and organising these procedures and must be objective, transparent, and proportional to such costs. Rights to use radio frequencies which are subject to generalised accessibility (in accordance with the National Frequency Plan) are subject to a one time fee of €1,000. If the rights to use are granted by a different entity (not ICP-ANACOM) a fee of €500 will be due.
- A one-off fee for the issue of individual rights of use for numbers of €200 is applicable for each request and does not depend on the number and type of numbers required. If numbers are transmitted from one operator to another, the operator that transmits the numbers must pay a one time fee of €200.
- Annual fee regarding the provision services or networks, which takes into account the revenues generated by operators, who must inform ICP-ANACOM by the 30 June each year of the revenues directly generated with the provision of electronic communication services. The act provides for three different levels. Operators that generated revenues less than €100,000 in the preceding year will be exempted from paying this fee. Operators that generated revenues between €100,001 and €1.5 million will pay a fee of €2,500. Operators that generated revenues of more than €1,500,001 will pay a fee based on the following factors: the revenue generated in the preceding year; the percentage of revenue generated in relation to the market (sum of revenue of all operators); and ICP-ANACOM's administrative costs. Each year ICP-ANACOM will define a value that will be used as a multiplier to be applied to the above-mentioned factors.
- Annual fee for use of numbers. The act provides for four different fees (A to D), according to the type and the scarcity of the number resources, as follows:
 - geographic and mobile numbers; nomadic VoIP; access to data networks, private voice networks – €0.02 per number, per year;
 - voice-mail, audio text, shared costs numbers, shared revenue numbers, virtual cards, personal or short numbers – €0.04 per number, per year;
 - NSPC – National Signaling Point Code – €20 per number, per year; and
 - ISPC - International Signaling Point Code; DNIC – Data Network Identification Code; IIN – Issuer Identifier Number; (T)MNC – Trucking Mobile Network Code; SID – System Identifier CDMA; NET – Network Operator identity (MPT1343) – €200 per number, per year. Use of free numbers (emergency numbers, etc) is not subject to any fee. This fee is payable in September of each year.
- Annual fee for use of radio frequencies. This fee is calculated in accordance with actual use of the radio frequencies, ie, with the amount of spectrum (measured in MHz). The fees are different according to the service. For example, terrestrial mobile services

are subject to a fee of €120,000 per MHz, whilst terrestrial analog television services are subject to a fee of €45,000 per MHz. This fee is payable in September of each year. During 2009 and 2010 (adaptation period) the annual fee will be reduced. In 2009 operators will only pay a fee corresponding to: (value of the 2008 fee x 0.667) + (new fee x 0.333). In 2010 operators will only pay a fee corresponding to: (value of the 2008 fee x 0.333) + (new fee x 0.667). Please note these reductions will not apply to radio frequencies granted from 1 January 2009.

13 Authorisation timescale

How long does the licensing authority take to grant licences or other necessary authorisations?

There is no licensing system for the provision of telecoms networks or services. After a request has been notified to ICP-ANACOM, the providers may immediately initiate their activity.

In what regards individual rights of use, decisions must be adopted by ICP-ANACOM within 15 business days in case of number attribution within the National Numbering Plan, and within 30 business days in case of frequencies according to the NPFA.

14 Licence duration

What is the normal duration of licences?

Licences (issued before the ECL came into effect) and individual rights of use are valid for 15 years, and can be renewed for equal periods.

15 Modification and assignment of licence

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

ICP-ANACOM may modify licences and authorisations pursuant to requests from the titleholders. It may also authorise assignment of licences and authorisations. Licences shall not be pledged as security for financing purposes.

16 Radio spectrum

Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

There is no specific regulation regarding refarming. However, ICP-ANACOM is legally obliged to ensure an efficient use of the spectrum, and may, in case of misused or unused spectrum, reclaim and assign radio spectrum. RF licences always specify their permitted use.

17 Cable networks

Is ownership of cable networks, in particular by telecoms operators, restricted?

There are no restrictions to cable networks ownership by telecoms operators.

18 Local loop

Is there any specific rule regarding access to the local loop or providing for local loop unbundling?

Yes. The incumbent operator, Portugal Telecom, declared by ICP-ANACOM as having significant market power, must publish a reference offer for the access to the local loop, providing for: conditions

for unbundled access to the local loop, sharing of sites, information systems and conditions of the offer.

19 Internet services

How are internet services, including voice over the internet, regulated?

Internet services are generally regulated, as any other telecoms services, by the ECL. The only specific regulation regards quality levels of broadband internet access (levels of availability of service and repair response times).

Regarding voice over the internet (VoIP), following a public consultation in November 2005, ICP-ANACOM approved some general guidelines. These guidelines include rules regarding the characterisation of the service, numbering, portability, access to emergency services, service quality standards, interconnection, information to be rendered to consumers and information to be submitted to ICP-ANACOM. The telecoms regulator distinguished between fixed VoIP and nomad VoIP. Fixed VoIP is subject to the same rules as fixed voice telephony. Nomad VoIP uses a different numbering prefix and is subject to lighter regulation.

20 Internet service provision

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers?

No, there are no limits.

21 Broadband

Is there a government financial scheme to promote broadband penetration?

The government considers broadband penetration a priority. In this context, a resolution from the Council of Ministers approving a 'National Initiative for Broadband' was published in 2003, as part of the national 'Action Plan for the Information Society'. There is a government financial scheme aimed at promoting broadband penetration to which the operators who were granted the UMTS licences have significant contributions.

Within the scope of the National Initiative for Broadband, a programme called 'Connect Portugal to Broadband' was set in motion, and in June 2006, the Minister for Public Works, Transport and Communications announced that all the national territory was to be covered by a telecoms infrastructure which allowed access to broadband services. Projects such as ensuring availability of free broadband access in schools are in progress.

22 Interconnection

How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? What are the basic interconnect tariffs?

Interconnection is regulated under the ECL. Operators are free to negotiate and agree upon technical and commercial interconnection modalities. ICP-ANACOM may set out obligations for the operators in what regards access and interconnection, and may intervene, on its own or at the request of any of the concerned parties, to resolve inter-operator disputes in the framework of interconnection agreements.

One of the obligations currently imposed is the obligation for the incumbent to publish, on an annual basis, an interconnection reference offer, determining applicable prices for interconnection. This offer is subject to review by ICP-ANACOM, prices being frequently modified by the regulator.

Mobile termination tariffs will probably be changed this year.

Basic interconnection tariffs are:

- fixed termination: €0.0049 per activation plus €0.0019 per minute; and
- mobile termination (whether originating in fixed or mobile network) is €0.07 per minute for TMN and Vodafone; and €0.084 per minute for Optimus. On 1 October 2009, the price of the mobile termination will be the same for all operators: €0.065 per minute.

23 Mobile call termination

Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Are calls to mobile networks regulated, and, if so, how?

ICP-ANACOM issued a Decision on this matter in 2005, following the regulation framework established in 2004. The originating calling party is charged (calling party pays principle). As the tariffs applicable to fixed-mobile, mobile-fixed and mobile-mobile were determined only by the operators, and constituted a heavy burden on customers, ICP-ANACOM implemented a cost oriented regime of termination price fixing, through a gradual approximation to efficient level prices. This Decision imposed a schedule of maximum prices to be respected at determined deadlines, achieving termination price parity in October 2006 (€0.11 per minute).

On 2 July 2008, ICP-ANACOM issued another Decision on the matter, introducing asymmetric termination prices in order to benefit the smallest operator (Optimus) until 1 October 2009.

24 International mobile roaming

Are charges for international mobile roaming regulated?

Regulation 717/07, of 27 June, is enforceable in Portugal.

25 Retail tariffs

Are retail tariffs regulated? If so, which operators' tariffs are regulated and how?

Apart from prices of the universal service that are subject to approval and possible modification by ICP-ANACOM, retail tariffs are not regulated.

26 Customer terms and conditions

Are customer terms and conditions required to be filed with, or approved by, the regulator or other body?

Yes. The ECL obliges all operators to obtain prior approval from ICP-ANACOM for use of standard contracts. Furthermore, ICP-ANACOM has published a document specifying the minimum content to include in these contracts, which was recently amended (on 1 December 2008). There is also a public record of all contracts approved by ICP-ANACOM.

27 Changes to telecoms law

Are any major changes planned to the telecoms laws?

No particular changes were announced so far. Major changes will most probably not be adopted prior to the future revision of the applicable EU framework.

28 Next-generation networks

How are next-generation networks (NGN) regulated?

There is no specific regulation. Draft legislation has been published by the government and should enter into effect during 2009. How-

ever, the 2007 NPFA provides for radio frequencies for WiMax and Terrestrial Digital Television which probably means that specific rules will be adopted in the near future.

29 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?

No. However, in 2007, following the attempted merger between SONAE COM and Portugal Telecom, Portugal Telecom decided to pursue the spin-off of PTM (content and pay-tv) from Portugal Telecom.

Media regulation

30 Ownership restrictions

Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?

Ownership and control are regulated. Most transactions (such as mergers and acquisitions) must be approved by the media regulator (notwithstanding standard antitrust law obligations). There is a draft legislative proposal on the concentration in the media sector which is under discussion.

Ownership of both television and radio operators must be transparent – in the case of public limited companies, shares must be nominative. For television operators, all participations which are considered to have significant influence in the company's administration (in principle, when the participation is of, at least, 10 per cent of the share capital or of the voting rights) must be disclosed each year, in a periodical publication of national coverage.

Furthermore, broadcasting cannot be exercised or financed by political parties or associations, local autarchies, professional organisations, employers' associations or unions, directly or indirectly.

There are no restrictions applicable to foreign investors' participation.

31 Cross-ownership

Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Television

Acquisition, by a television operator, of any participation in any other entity legally entitled, or a candidate to exercise television activities, to the extent they do not configure a concentration subject to review by the Portuguese Competition Authority, must be notified to ERC.

Radio

Change of control in a radio company or concentration between radio companies must be subject to ERC's prior approval, which shall be given if the conditions which determined the attribution of the licence are maintained. In cases of concentration, the authorisation will be denied if it manifestly hinders freedom of speech and confrontation between different opinions. Each person (or company) may hold a participation on a maximum of five radio broadcasters. Within the same municipality, participations of over 25 per cent of the share capital in more than one radio broadcaster with local scope programme services are not allowed.

Newspapers and other media

There are no specific rules regarding cross-ownership in newspapers or regarding cross-ownership between different types of media.

32 Licensing requirements

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

Television

The activity of television broadcasting is subject to a licence through a public tender or an authorisation, depending on whether the radio spectrum is used or not. Granting of licences or authorisations depends on the technical quality and economic feasibility of the project. Candidates must submit documentation, including a full description of the activity, technical project and economical study.

Licences and authorisations are valid for a period of 15 years, renewable for equal periods. For licences (broadcasting using the spectrum), the timescale for the ERC decision is 45 days from the closing of the tender, and broadcasting must begin within the following six months.

Fees for licence issuing or renewal are currently around €270,000 for national broadcast, €43,000 for regional broadcast and €11,000 for local broadcast, according to Act 136/2007, of 29 January. The existence of a public tender depends on a government decision. For authorisations (no spectrum used), authorisation is granted by the ERC within 15 days from request. The payable fee for issuing or renewal is around €27,000.

Radio

The same distinction is made, in respect to the use of spectrum, between licence and authorisation. Both licences and authorisations are valid for 10 years, renewable for equal periods. Payable fees for licence issuing or renewal are, according to Act 136/2007, of 29 January, around €27,000 for national broadcast, €11,000 for regional broadcast and €5,400 for local broadcast. For authorisation issuing or renewal, the fee is around €3,750.

33 Broadcast of foreign-produced 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?

Portugal has transposed the EC 'Television Without Frontiers' Directive. Under the Television Law, broadcasting of foreign content from countries outside this Directive, which is considered to disrespect human dignity, fundamental rights and the free development of children and teenage characters (containing pornography, hard violence or encouraging hatred, racism or xenophobia), may be restricted. National coverage television services (except those of incompatible nature or thematic) must dedicate at least 50 per cent of broadcasts to programmes in the Portuguese language (and 15 per cent to creative programmes of Portuguese language productions) and the majority of the broadcasting time must be dedicated to European works.

The Radio Law establishes specific rules to support Portuguese music. In this context, all radio stations (except those dedicated to contents insufficiently produced in Portugal), must dedicate a variable minimum percentage of 25 to 40 per cent to Portuguese music (the share is of 60 per cent for the public radio service). The 'Portuguese music quota' must be fulfilled with at least 60 per cent of music composed or interpreted in the Portuguese language by EU member state nationals. Administrative Rule 265/2008, of 9 April, established a minimum percentage of 25 per cent to Portuguese music, for one year (since 3 May 2008 until 3 May 2009).

34 Advertising

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

Advertising in general is regulated by the Publicity Code, which determines some content restrictions (for example, on alcohol, tobacco,

'miracle products', gambling, etc). Regarding television broadcasting specifically, the main aspect regulated by the Television Law is the duration of the advertising, which may not exceed 20 per cent of the daily emission time for non-conditional access services, and 10 per cent for conditional access services. Telesales blocks may not exceed a limit of three hours a day. Advertising should be inserted between programmes, and may only interrupt them if it does not hinder the programme's integrity (subject to further conditions).

As for radio broadcasting of advertisements, the Publicity Code also applies with some adaptations set forth by the Radio Law: the sponsored programmes must include, in the beginning and at the end, express mention of the sponsors; insertion of publicity adverts may not hinder the programme's integrity; advertising may not exceed 20 per cent of the total daily emission time.

Online advertising is also regulated by the Publicity Code.

35 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?

ICP-ANACOM may impose must-carry obligations on operators, when a significant number of final users of the networks use them as the principal mean to receive radio and television broadcasts. ICP-ANACOM may also determine adequate remuneration as compensation for these obligations.

36 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific regulations or laws in place or anticipated for those services?

The regulatory framework for mobile operators continues to be unclear.

37 Regulation of online content

How is the delivery of content online regulated?

The delivery of content online is not subject to a specific regulation, unless it is considered as television. In this case, it is subject to the Television Law.

38 Digital switchover

When is switchover from analogue to digital broadcasting required? How will the radio frequencies that are freed up from this switchover be reallocated?

Portugal intends to switchover in 2012. The procedure has suffered some incidents and has been delayed: in 2001, a public tender was launched and a licence to establish and explore a digital terrestrial television platform was granted to PTDP – Plataforma de Televisão Digital Portuguesa SA. Commercial exploration was due to begin in 2002. After an extension of the initial deadline by the minister of the economy, the licence was finally revoked in March 2003. In 2004, a 'Mission Unit for Digital Television' was created within ICP-ANACOM. Since then, several special licences have been granted for the performance of technical tests.

In 2008, two public tenders for licensing of digital terrestrial television (TDT) were launched: one regarding the four general Portuguese channels; and the other for remaining channels. Both licences were attributed to the incumbent. However, in the second one, there was another candidate, Airplus, who is challenging the contract award in court.

Regulatory agencies

39 Regulatory agencies

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

As previously mentioned, the communications sector is divided into two, regarding regulation: the telecoms regulator is ICP-ANACOM, and the media regulator is ERC.

40 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

Both regulators are legal persons of public law, with administrative and financial autonomy, and belong to the category of entities which are considered to be 'independent administrative authorities'.

Four out of five directors of ERC are elected by parliament, the fifth director being elected by the remaining four members. Directors of ICP-ANACOM are appointed by the Council of Ministers on the basis of a proposal of the minister responsible for communications.

In order to ensure their independence, directors shall not have any connection whatsoever with network operators, telecoms service providers, undertakings, associations of undertakings and unions in the communications sector, former members of the government or local authorities (ERC) in the preceding two years. They are also prevented from working in the telecoms or communication sectors for a period of two years after the end of their terms. Directors cannot be dismissed except in very specific circumstances (substantial breach of their duties; condemnation for crime). Their terms cannot be renewed.

41 Appeal procedure

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

Regarding ICP-ANACOM's decisions, the competent jurisdiction depends on the type of decision: if the decision regards a misdemeanour, it can be challenged before judicial courts; in case of fines applied to Portugal Telecom or CTT (the universal postal service provider) for non-fulfilment of contractual obligations, an appeal can be brought before arbitration courts; all other administrative decisions may be challenged before the administrative courts.

As for ERC, sanctions applied for misdemeanours may be challenged before judicial courts; decisions made within the scope of conflict resolutions are subject to appeal before judicial or administrative courts.

42 Competition and telecoms and broadcasting regulation

To the extent that there are separate national regulatory bodies for the telecoms and broadcasting sectors responsible for sector-specific regulation and a national competition authority responsible for general competition rules, what is the respective scope of their jurisdiction in the telecoms and broadcasting sectors? Are there any mechanisms under national law to avoid conflicting exercise of jurisdiction by the authorities? Is there a specific mechanism to ensure the consistent application of competition and sector-specific regulation?

With telecoms, ICP-ANACOM has the responsibility of regulating the market in order to ensure that access by the operators to the communication networks is made in transparent and equivalent circumstances, further promoting competition. For said effect, it coordinates the application of the competition law and principles with the competent authority, the Portuguese Competition Authority (PCA

– Autoridade da Concorrência). For the media, ERC plays a similar role through the monitoring of the sector.

The PCA is the entity which holds jurisdiction and decision-making power over competition issues. Under the Portuguese Competition Law (Law 18/2003, as amended by Law 52/2008), whenever the PCA has knowledge of facts within a regulated sector (as are telecoms and media) that may be construed as hindering competition, it immediately notifies the competent regulator, so it can provide its opinion (the same notification procedure is followed when the PCA is evaluating an undertaking's concentration within regulated markets, before it takes its final decision).

On the other hand, when ICP-ANACOM or ERC, by themselves or at the request of regulated entities, come to evaluate a situation that may configure a violation of the competition law, they must immediately give notice of the procedure to the PCA (who will then decide if it will open an inquiry). In these cases, before a final decision is issued by the regulator, it must be submitted to the PCA, for approval.

43 Interception

Do any special rules require operators to assist government under certain conditions in the interception of telecommunications messages?

In accordance with the ECL, all operators must install, at their own expense, and make available to the competent authorities, systems of legal interception, and supply decrypting or decoding services, when relevant.

44 Data retention obligations

What are the obligations for operators and service providers to retain the data of its customers? Will they be compensated for their efforts?

Traffic data is regulated by Law 41/2007, of 18 August, which implements Directive 2002/58/EC. The relevant rule is contained in article 6 which states that traffic data may be processed for the purposes of billing services and paying interconnection charges during the period that the invoice may be legally contested or that payment may be demanded. The relevant period is in this sense the period provided for in the limitation of actions rules. This period is currently for six months after service was provided.

Portugal has also implemented Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, by Law 32/2008. Portugal has defined a one year retention period and that data stored for the purpose of complying with Directive 2006/24/EC must be separated from any other data.

45 Unsolicited communications

Does the legislation prohibit unsolicited communications? Are there exceptions to the prohibition?

Law 7/2004 (as amended by Decree-Law 62/2009) sets forth, as a general rule, the prohibition of unsolicited marketing communications through automatic calling devices, telecopy and e-mail without prior consent from the addressee (opt-in system). Exception is made to communications from suppliers or sellers who have celebrated prior transactions with the addressee, in respect to similar services or products. There is a list (the Robinson list) to which any person may join, which is managed by the Consumer Directory General. Unsolicited communications sent to the persons on this list are forbidden. For companies, the system is opt-out.

Competition and merger control

46 Competition law in the telecoms and broadcasting sectors

Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator or competition authority controls these practices?

Anti-competitive practices in telecoms and media are regulated by the general competition law (Law 18/2003, as amended by Law 52/2008 PCL) and are controlled by the PCA, after hearing the relevant regulator (ICP-ANACOM for telecoms and ERC for Media – see question 42).

47 Regulatory thresholds for review

What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting sector?

The rules for the review of mergers, acquisitions and joint ventures are laid down by the PCL, and there are no specific rules for telecoms and media.

Under the PCL, a ‘concentration’ is subject to prior notification to the PCA when, as a result of that concentration, a market share of over 30 per cent is created or reinforced within the national relevant market or in a substantial part thereof, or the undertakings participating in the concentration have achieved in Portugal, in the precedent year, a net turnover of over €150 million, and as long as the turnover individually achieved in Portugal by at least two of the undertakings concerned exceeds €2 million.

The substantive test performed by the PCA is the assessment of the concentration’s effects over the competition structure, taking into account the need to preserve and develop, in the interest of intermediary and final clients, effective competition within the national market (for said effect, studying the market structure, the position of the participating undertakings, potential competition and barriers, the possibility to choose suppliers and users, access to supply sources, distribution network structure, offer and demand evolution, existence of special or exclusive legal rights, control over essential infrastructures, evolution of the technical and economical progress and the contribution of the concentration to international competition and national economy). The concentration operations will be authorised if they do not create or reinforce a dominant position, which significantly hinders the effective competition in the national market or in a substantial part thereof.

48 Merger control authorities

Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms and broadcasting sectors?

The PCA is responsible for the review of mergers, acquisitions and joint ventures of undertakings performing any economic activities, permanently or occasionally, in the private and public sectors – including the telecoms and media sectors.

Nevertheless, a final decision in these procedures can only be issued by the PCA after hearing the relevant sector regulator (ICP-ANACOM for telecoms and ERC for media).

49 Procedure and timescale

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

After being notified by the participant undertakings, within five days the PCA publishes a notice in national newspapers for any possible interested third parties to present their observations to the operation.

Also counting from the notification date, the PCA has 30 days to complete the instruction proceedings, unless, during said term, it has notified the participating undertakings to provide additional documentation (this incident suspends the instruction phase term until the additional data is received by the PCA).

At the end of the instruction phase, the PCA decides whether the operation is not subject to prior notification in the first place; not to oppose to the operation (sometimes imposing conditions or obligations to ensure the maintenance of effective competition); or to start an in-depth investigation, if there is reason to believe that the operation may hinder competition.

If there is an in-depth investigation, the PCA has 90 days to proceed with the diligence it deems appropriate, after which it may decide not to oppose the operation (eventually imposing conditions or obligations to ensure the maintenance of effective competition), or to prohibit it.

Before a decision is taken (whether in instruction phase or in-depth investigation), the PCA must hear all interested parties (undertakings concerned and counter-interested parties) and the sector regulators (ICP-ANACOM for telecoms and ERC for Media).

PLMJ

Luís Miguel Pais Antunes

lpa@plmj.pt

Avenida da Liberdade, 224
1250-148 Lisbon
Portugal

Tel: +351 213 197 300
Fax: +351 213 197 400
www.plmj.pt

QUICK REFERENCE TABLES

Portugal				
Regulatory agencies and responsibilities	Broadcasting and telecoms service licences, type and duration	Treatment of internet services	Licence fees	Tariff and other regulation of dominant companies
<ul style="list-style-type: none"> • Telecoms are regulated by ICP-ANACOM (National Communications Authority) and media by ERC (Entity for the Regulation of the Media). • These two independent regulators are responsible for policy making and supervision of their respective sectors. 	<ul style="list-style-type: none"> • The majority of telecoms services is only subject to an authorisation procedure. Individual rights of use are only required for numbering and radio spectrum resources. For certain services (such as mobile telephony and terrestrial digital television) public tender procedures are used to award licences. • Broadcasting licences are subject to a prior authorisation procedure. • Duration of most licences and authorisations is 15 years. 	<ul style="list-style-type: none"> • Internet services are subject to minimal regulation. • Fixed VoIP is treated as fixed voice telephony. • Broadband penetration remains quite low (around 15.1% for fixed access and 19.8% for mobile access (Q308 figures)). 	<ul style="list-style-type: none"> • Fees are charged for grant of authorisations at the government's discretion. • Administrative and annual fees are charged to all operators. • Fees are also charged for radio spectrum usage. 	<ul style="list-style-type: none"> • Interconnect tariffs are still heavily regulated. • The incumbent operator is bound by universal service obligations and must publish reference offers for interconnection, resale of final user lines, local loop unbundling, internet access, leased lines, ADSL and access to ducts.

GETTING THE DEAL THROUGH[®]

Annual volumes published on:

Air Transport	Merger Control
Anti-Corruption Regulation	Mergers & Acquisitions
Arbitration	Mining
Banking Regulation	Oil Regulation
Cartel Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Dispute Resolution	Product Liability
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Environment	Restructuring & Insolvency
Franchise	Securities Finance
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
Licensing	Vertical Agreements

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association