

#### What changes?

#### NEW ELECTRONIC COMMUNICATIONS ACT



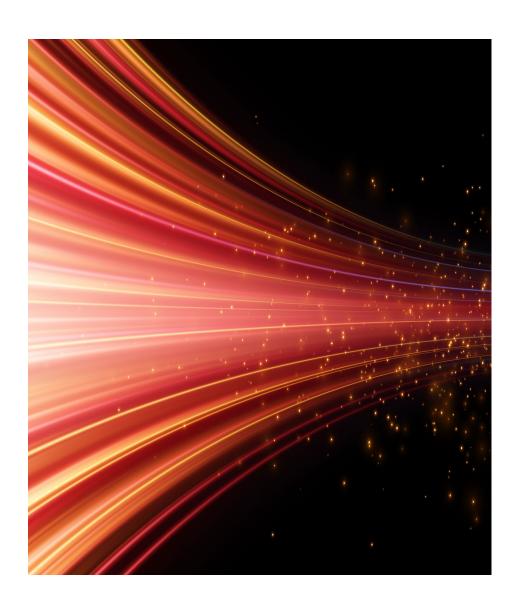
Any information provided and opinions expressed herein are general in nature and not in lieu of proper legal advice concerning specific cases.

This document is not in lieu of consulting the oficial version of Law 16/2022, of 16 August 2022, which enacted the New Electronic Communications Act.



#### Index

Background	5
General Authorization and Operator Rights and Obligations	15
End-User Rights	23
Radio Spectrum	33
Interpersonal Communications Services	43
Regulatory Obligations	51
Security of Electronic Communications Networks and Services	57
Fees	67
Universal Service	75
Small-Area Wireless Access Points and Radio Local Area Network Access	85
Administrative Offence Framework	93
Correlation Table of the New Electronic Communications Act	103



# **— 01** —

What changes?

### New Electronic Communications Act

Background

### **–** 01 –

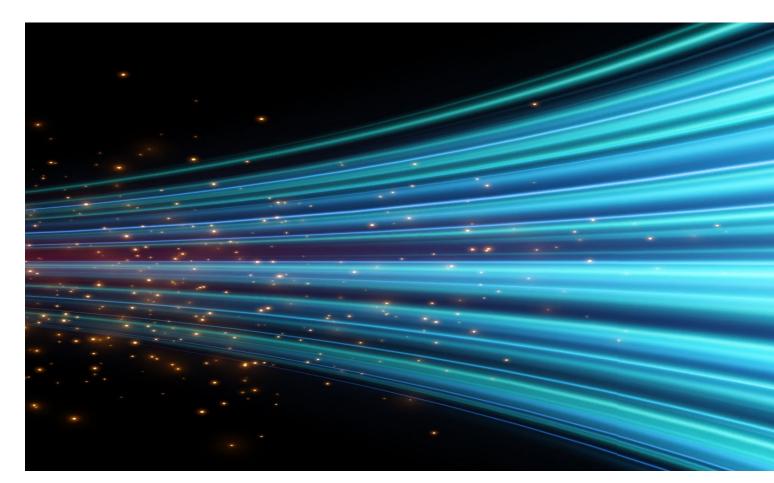
#### **Background**

The new Law 16/2022, of 16 August 2022 (available here, "New Electronic Communications Act") transposes Directive (EU) no. 2018/1972, of the European Parliament and of the Council, of 11 December (available here, "EECC" or "European Electronic Communications Code") into national law, repealing the former Electronic Communications Act, i.e., Law 5/2004, of 10 February 2004.

This article aims to provide an overview of the main aspects of the New Electronic Communications Act, including its context, purpose, scope, and application in time, alluding also to some specific matters it regulates.

#### What is the context of the New Electronic Communications Act?

he EECC, which replaced the so-called "Directive Package" of 2022 on the regulation of the electronic communications sector, seeks to bring the regulatory framework in step with current sector trends and requirements. The New Electronic Communications Act, which follows the EECC to the letter, addresses concerns such as promotion of investment in very high capacity networks, the geographic expansion of fiber optic networks in Portugal, the reinforcement



-01-

of end-user rights, among other aspects.

#### What entities are subject to the New Electronic Communications Act?

ts scope is one of the chief innovations in the New Flectronic Communications Act, which stems from the extension of the "electronic communications service" concept. Internet access service, as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November, and number-based or number-independent interpersonal communications services (the so-called over-the-top services or OTTs) have joined the "classic" paid signal-sending services provided over electronic communications networks. The New Electronic Communications Act further applies to entities not providing any services falling under the above categories but providing electronic communications networks. which were already subject to the Act's predecessor.

#### What is the purpose of the New Electronic Communications Act?

he New Electronic
Communications Act is a
very long and comprehensive

piece of legislation establishing rules applicable across the electronic communications sector. To help you better interpret this document, we have prepared detailed texts on a range of subject-matters, namely:

- i. the general authorization framework;
- ii. the radio spectrum framework;
- iii. the interpersonal communications services framework:
- iv. end-user rights; and
- v. market regulation.

We will nevertheless continue to write about other relevant subject-matters and invite you to visit our website from time to time to keep updated.

### What is new in the New Electronic Communications Act relative to the previous framework?

he New Electronic
Communications Act extensively
changed the framework laid
out by its predecessor. In addition
to the specific novelties related to
the matters listed above (and more
detailed in the relevant texts), other
innovations introduced by the New
Electronic Communications Act bear
highlighting:

 Social regulation: while the New Electronic Communications Act establishes new and important rules on the universal service, the so-called "social regulation" is presently driven by the Internet social tariff, as approved under Decree-Law 66/2021, of 30 July 2021. This shift in the social regulation's epicenter bedims the role and contribution of the new universal service rules to achieve the social regulation goals.

ii. A "new deal" for the sector's regulation: the New Electronic Communications Act reinforces ANACOM's powers regarding several areas, including radio spectrum management. ANACOM now has, for example, powers to promote spectrum sharing (including passive and active infrastructure) and to impose commercial agreements or roaming access obligations to promote mobile network coverage, as well as powers to ensure (apparently, by extension) the simultaneous expiry of assigned rights of use. On the flip side of the coin, ANACOM also seems to have lost some of its powers in this area. The New Electronic Communications Act provides that all regulations regarding tenders or comparative selection procedures for the allocation of frequency rights of use must be approved by the member of the government in charge of communications. The New

- Electronic Communications Act, following the EECC very closely, expressly foresees the intervention of other appropriate authorities in sector regulation, including regarding end-user rights.
- iii. Geographical surveys for **network roll-out:** the New Electronic Communications Act requires ANACOM to carry out the first geographical survey by 21.12.2023. The survey includes the geographical coverage of existing broadband networks and the forecast of the geographical coverage of new broadband networks for a certain period of time defined by ANACOM, including very high capacity networks. Based on the survey, ANACOM may designate delimited geographical areas where no undertaking offering public electronic communications networks has rolled out or intends to roll out a very high capacity network or upgrade an existing network to download speeds of at least 100 Mbps within the period of time defined by ANACOM, and invite these undertakings to submit expressions of interest in this regard. The identification and development of "white areas", i.e., areas where there is no fixed network coverage with very high

-01-

capacity is a linked topic: a public tender will be launched in 2022.

iv. Wireless access points of reduced areas: : the roll-out and operation of wireless access points of reduced areas (which comply with the physical and technical characteristics set out in implementing acts of the European Commission) will be exempt from any licensing, authorization, or prior communication to ANACOM, except when rolled out in buildings or locations with protected architectural, historic. or natural value, or for reasons of public safety.

#### Other than repealing the former Electronic Communications Act, did the transposition of the European Electronic Communications Code amend any acts?

es. In addition to the New Electronic Communications Act, the transposition of the EECC entailed several legislative changes, namely:

- Law 41/2004, of 18 August 2004 (electronic communications sector privacy act);
- ii. Law 99/2009, of 4 September 2009 (framework law for administrative offences in the electronic communications

- sector); Decree-Law 151-A/2000, of 20 July 200 (framework law for radio communication networks and stations);
- iii. Decree-Law 42/2009, of 20 July 2009 (framework law for electronic communications); and
- iv. Decree-Law 24/2014, of 14 February 2014 (framework for distance and off-premises contracts).

#### Will the New Electronic Communications Act have any impact on ANACOM acts and regulations issued under the predecessor framework?

NACOM maintains its authority to approve the regulations Inecessary to implement the new act under the New Electronic Communications Act. Any ANACOM acts and regulations adopted under the previous Electronic Communications Act will remain in force until they are replaced or repealed, so long as they do not clash with the New Electronic Communications Act It should be particularly highlighted that ANACOM is tasked with regulating the duty of prior communication and with approving, taking into account the guidelines published by the ORECE (document BoR (19) 259, published on 6

December 2019), the templates appropriate for such communications. Until then the templates approved under ANACOM's Regulation 6/2018, of 5 January 2018, remain in force.

### When does the New Electronic Communications Act enter into force?

ot all rules of the New Electronic Communications Act will become effective at the same time. As a rule, the provisions of the New Electronic Communications Act will become effective within 90 days from publication (i.e., on 14 November 2022). But there are exceptions to this rule, notably:

- Rules on limitations on charges required in the event of contract termination, which will become effective 60 days after the New Electronic Communications Act comes into force (i.e., on 13 January 2023);
- ii. Rules on emergency communications and the single European emergency number, which will become effective upon the opening to the public of each means of access to emergency services by the relevant national authorities; or
- iii. Rules on network and service security, including additional requirements and a scheme

of assistance and cooperation with the Equipa de Resposta a Incidentes de Segurança Informática Nacional [National Computer Security Incident Response Team], which became effective the day after their publication (i.e., on 17 August 2022).

The New Communications Act is not clear as to when some other things will become effective, such as the system to provide a contract summary. This is a matter that requires special attention.

We also note that the application of the New Electronic Communications Act to contracts with end-users pre-dating its entry into force is not straightforward. We will be addressing this question in greater detail in our text on end-user rights.

#### Key takeaways

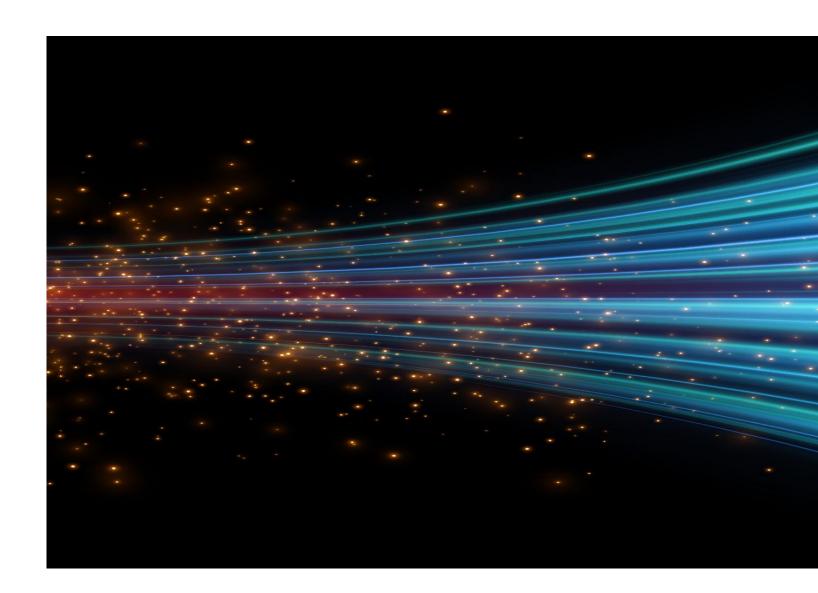
he New Electronic
Communications Act transposes
the European Electronic
Communications Code into national
law (the transposition has been
pending since late 2020). Replacing
an almost 20-year old act (Law
5/2004, of 10 February 2004), the
New Electronic Communications Act,
despite not changing the structural

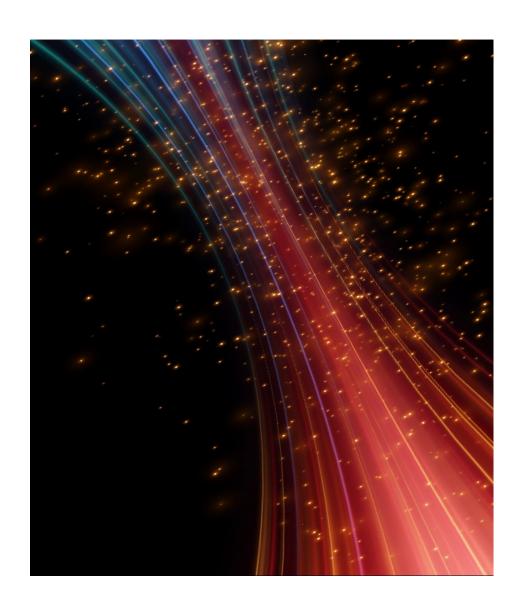
### - 01 -

pillars of the sector's regulation (which continue to be roughly based on the same legal concepts and frameworks), brings remarkable innovations that warrant close attention.

It is worth noting the increase in the categories of services subject to its rules, such as Internet access services and number-based and number-independent interpersonal communications services. The rules of the New Electronic Communications Act come into effect at different times, which adds complexity to the issue. While most rules become effective on 14 November 2022, some rules have already entered into force on 17 August, and there are still others that will become effective from 13 January 2023.

Finally, it should also be noted that the transposition of the European Electronic Communications Code also brought about the amendment of several other pieces of legislation of interest to the sector, including a substantial overhaul of the framework for liability for the commission of administrative offenses.





# -02 -

What changes?

### New Electronic Communications Act

General Authorization and Operator Rights and Obligations

### -02-

### General Authorization and Operator Rights and Obligations

This text seeks to highlight some of the main aspects of the New Electronic Communications Act regarding the general authorization framework, as well as the rights and obligations of undertakings providing electronic communications networks or services, as set forth in its Articles 16 to 30.

### What entities are subject to the general authorization framework?

ndertakings providing public and paid electronic communications networks and services are subject to the general authorization framework (Article 16.2), the latter being understood as offers on a self-provision basis. Excluded from this framework are:

- i. undertakings providing numberindependent, interpersonal communications services (the so-called over-the-top services, or OTTs); and
- ii. undertakings providing access services to a public electronic communications network through a local network via radio, where this is not part of an economic activity or a public utility that does not depend on sending signals on that network

(article 16.3).

### What entities are subject to the duty of prior start of activity communication?

ndertakings wishing to provide public electronic communications networks and publicly available electronic communications services are subject to the duty of prior start of activity communication (Article 17.1). Undertakings wishing to provide paid electronic communications services join undertakings not subject to the general authorization framework in their exemption from such duty. ANACOM may also, by regulation, exempt from this duty undertakings providing certain types of public electronic communications networks and publicly available electronic communications services (Article 18).

### What information must be included in the start of activity communication to ARN?

The start of activity communication needs to include:

 A declaration of the intention to start the activity;

- The undertaking's identification information and their website address associated with the provision of public electronic communications networks and electronic communications services accessible to the public;
- iii. Contact details for communication and notification purposes, including a mandatory email address;
- iv. A short description of the network or service intended to be provided;
- v. The estimated date for starting the activity.

ANACOM is tasked with regulating the prior communication duty and with approving the templates for such communications, taking into account the guidelines published by the ORECE (document BoR (19) 259, published on 6 December 2019). Until then, the templates approved under ANACOM's Regulation 6/2016, of 5 January 2016 will remain in force.

### What are the rights of undertakings providing electronic communications networks or services?

Undertakings providing electronic communications networks or services

(whether publicly accessible or otherwise) are entitled (Article 20.1) to

- request the establishment of rights of way;
- ii. use the radio spectrum for the provision of electronic communications networks and services:
- iii. request the use of numbering resources: and
- iv. negotiate agreements between themselves on technical and commercial arrangements for access or interconnection.

Undertakings providing public electronic communications networks or publicly available electronic communications services are also entitled (Article 20.2):

- to negotiate interconnection with and obtain access to or interconnection from other undertakings providing public electronic communications networks and publicly available electronic communications services; and
- to provide any of the universal service provisions or to cover different parts of the national territory.

### -02-

# To which general and specific conditions can the activity of undertakings providing electronic communications networks and services be subject?

Basically, undertakings providing electronic communications networks and services may be subject to the general conditions already provided for under the previous Electronic Communications Act, namely (Article 27.1):

- access obligations (other than as a specific obligation);
- ii. obligations of interconnection of networks and interoperability of services;
- iii. obligations regarding the processing of personal data and the protection of privacy in the electronic communications sector; obligations regarding the security and integrity of public electronic communications networks, namely under Decree-Law 31/2017, of 22 March 2017;
- iv. obligations to install and provide lawful interception systems to national authorities and to supply the means of decryption whenever they provide these facilities;
- v. conditions of use of radio spectrum for electronic communications services;
- vi. conditions of use to ensure communications between emergency services, the

- appropriate authorities, and civil defense agents with the general public; or
- vii. obligation to provide information, namely in compliance with the statutory reporting duties.

The above general conditions do not The above general conditions do not apply to undertakings not subject to the general authorization framework. In addition to these general conditions, undertakings providing electronic communications networks and services may also be subject to specific conditions regarding access and interconnection, retail market controls and universal service (Article 28), in line with the previous Electronic Communications Law.

Electronic Communications Act, it should be noted that undertakings providing number-independent interpersonal communications services may, in certain cases, be subject to access and interconnection obligations, as better detailed in our text on the framework applicable to interpersonal communications services.

## How can the rights and obligations of undertakings providing electronic communications networks and services be changed?

his framework was not significantly changed by the New Electronic Communications Act. The rights and obligations of undertakings providing electronic communications networks and services, including with regard to the use of radio spectrum and numbering resources, may therefore be amended in objectively justified cases, in keeping with the proportionality principle, by law, regulation, or administrative act (article 21.1).

As a rule, these changes are subject to the public consultation framework, except if they are minor changes that do not affect the substantial nature of the use rights, namely by not

creating comparative advantages, and provided that the respective holders agree.

### How can radio spectrum and numbering resources use rights be restricted or cancelled?

he holders of these rights are afforded a general guarantee that they cannot be restricted nor cancelled before their expiry (Article 22.1). In certain circumstances, however, the law allows their restriction or cancellation before that time:

- i. with the consent of the relevant holder;
- ii. in justified cases, in accordance with the conditions attached to their titles:
- iii. to ensure the effective and efficient use of numbering



-02-

- resources or the radio spectrum; and
- iv. to ensure the technical implementation measures adopted under Article 4 of Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Article 22.2).

In the last two instances, the restriction or cancellation of rights of use is predicated on the existence of a previously established and clearly defined non-discriminatory procedure that abides by the proportionality principle. Moreover, in the absence of the right holder's consent, the public consultation procedure must be applied (Article 22.3).

The restriction or cancellation of rights of use entitles the holder to full or partial compensation (to be determined by ANACOM) for special and abnormal charges or damages they incur, and the framework of compensation for sacrifice in the context of tort of the State and other public entities applies (Article 22.4). Basically, the framework that already resulted from Decree-Law 151-A/2000, of 20 July 2000, to a certain extent is resumed here, although it has been specifically amended on this point, to make the framework clearer.

#### How can the right of way be exercised?

As a rule, undertakings providing public networks and publicly available electronic communications services have the right (Article 23.1) (i) to request expropriation and the creation of administrative easements necessary for the installation, protection, and conservation of their systems, equipment, and other resources, and (ii) to use the public domain, on equal terms, for the roll-out, right of way, or crossing necessary for the installation of their systems, equipment, and other resources.

Undertakings providing paid electronic communications networks and electronic communications services are only entitled to request the use of the public domain to install systems, equipment, and other resources (Article 23.2).

As in the previous Electronic Communications Act, the rule remains that rights of way cannot be restricted or withdrawn before their expiry, except with the consent of the holder or in justified cases. In these circumstances, the holder is entitled to receive compensation under the terms provided for the cancellation and restriction of rights of use, as mentioned above

#### What are the general siting and sharing terms?

Where undertakings providing public networks and publicly available electronic communications services have exercised rights of way, they must promote the execution of agreements among themselves for the siting and sharing of network elements and related resources installed or to be installed, whose terms and subsequent changes must be communicated to ANACOM (Article 24).

ANACOM retains the authority to determine, including cost sharing rules, the siting and sharing of elements for reasons connected with environmental protection, public health, or public safety, or to meet spatial planning and protection of the urban and rural landscape targets.

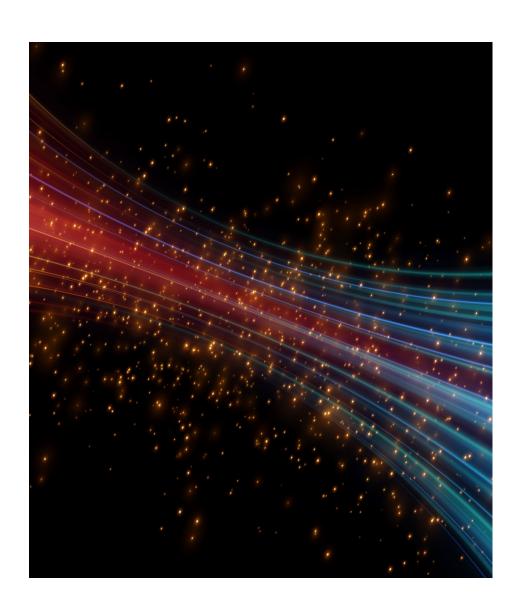
These powers complement ANACOM's other powers to impose access to infrastructure and localized roaming which we have analyzed in other specific texts on the New Electronic Communications Act.

#### **Key Takeaways**

The New Electronic Communications Act does not significantly change the general authorization framework, the duty of prior communication, and the general rights and conditions applicable to undertakings providing electronic communications networks or services.

However, the new framework clarifies how it will apply to OTTs and undertakings wishing to provide paid electronic communications services, although it remains to be seen how ANACOM will supervise and regulate these entities.

As for the rest, and particularly with regard to the general and specific conditions applicable to the activity of undertakings providing electronic communications networks and services, as well as their rights and obligations and the framework for their modification, restriction or cancellation, there are no significant material changes to be noted in this New Electronic Communications Act, but rather an effort to flesh out and clarify the applicable rules.



# -03 -

What changes?

### New Electronic Communications Act

End-User Rights

#### **End-User Rights**

This text seeks to highlight some of the main rules of the New Electronic Communications Act concerning the rights of end users, as set forth in its Articles 110 through 146.

#### What undertakings are subject to these rules?

ndertakings providing electronic communications networks or services are subject to the rules of the New Electronic Communications Act on end-user rights, including OTTs. Certain exemptions are allowed only for micro-enterprises offering number-independent interpersonal communications services (Article 110).

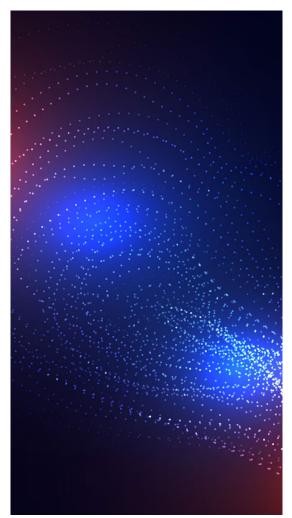
#### Who benefits from these rules?

Micro, small enterprises, or non-profit organizations join consumer endusers as the beneficiaries of these rules in line with the EECC, although express waiver of all or part of these provisions is allowed in certain cases. The relevance of this novelty is still to be tested against future market practices.

#### What are the main rights of end users?

All end users are, among other things, entitled to the following (Article 113):

- Be provided with written information on the service access and use terms and conditions;
- ii. Be provided at least 15-day notice of the termination of any service;
- iii. Be provided with information on the quality of the services provided:
- iv. Be provided with information on the billing for the services rendered, namely on the installation costs and on the expiry of the lock-in period;
- Increased protection for cases of non-express authorization/ subscription (e.g. "wap billing");
- vi. Have access to tools to compare prices and other conditions;
- vii. An immediate and proportional reduction of the monthly fee in cases of suspension of services for periods equal to or longer than 24 consecutive hours, subject to any compensation;
- viii. Access the services subscribed on a continued basis, and be informed of the suspension of the service; and
- ix. Portability of numbers.

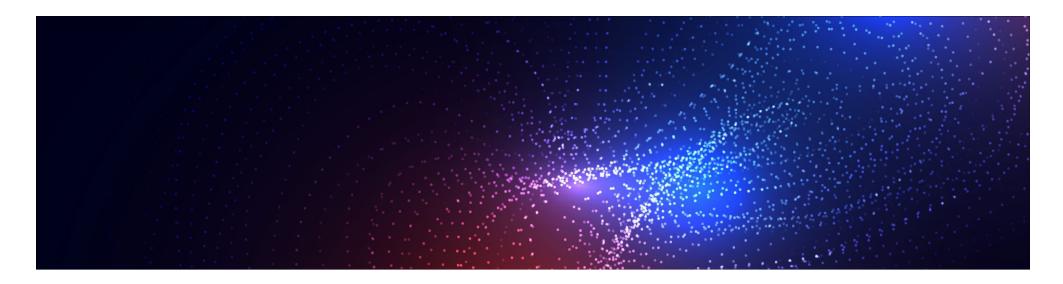


End users are further entitled to the following:

- x. Execute contracts containing the statutory specifications;
- xi. Upper thresholds for compensation payable for the breach of lock-in periods; and
- xii. Terminate the contract in the event of any discrepancy between the real and the agreed performance of the services.

#### Were there new non-discrimination rules introduced?

es. Among other things, the New Electronic Communications Act prohibits establishing different requirements or use or access conditions depending on nationality, place of residence, or place of business, save where objectively warranted, like costs and risks for example (Article 111). But the enshrinement of this principle could launch a discussion on how to read it in combination with the geographical block rules and what the expression "objectively warranted" actually means.



#### What are the main novelties in terms of procurement?

he cumbersome regime of pre-contractual information provision and service procurement arising from the previous Electronic Communications Act is reinforced in the new act (Articles 116, 120, and 121). The formalization and fleshing out of the obligation to adopt and provide the contract summary provided for in Commission Implementing Regulation (EU) 2019/2243 of 17 December (Article 120.6) is particularly noteworthy.

In terms of distance contracts, the exception relating to contracts by telephone contact by the consumer

was eliminated, leaving the guestion of how to deal with these situations. Furthermore, by providing that the "information [provided] becomes an integral part of the contract and cannot be changed without the express agreement of the parties" (Article 120.10), it is unclear what contract terms may be amended without the agreement of the parties. Lastly, regarding distance contracts where it is technically unfeasible to immediately provide the end consumer with a summary of the contract (Article 120.9), it is not clear when the contract enters into force, in view of the provisions of Article 120.12.

#### What are the main novelties in terms of bundles?

hen the bundle of services includes at least one publicly available Internet access service or a publicly available number-based interpersonal communications service, all the services in the bundle enjoy increased protection, notably in terms of transparency of information, summary of the contract, and rules on service provision (Article 114).

The right to terminate any service in the bundle before the end of the lock-in period also extends to all other services. Restrictions are also imposed on the extension of the initial contract's lock-in period in the case of subscription of additional

services or terminal equipment, although the scope of application of these rules is unclear.

### Was the Internet use control mechanisms framework substantially amended?

es. The right to "free alerts" in case of changes to normal consumption patterns, already provided for in the previous Electronic Communications Act, was reinforced with the right to "timely information on the level of consumption of the services included in the end-user's tariff plan" (Article 123).

### What are the essential features of the new unavailability of service framework?

proportional invoice reduction is foreseen in cases of service unavailability not attributable to the consumer for periods longer than 24 hours, independent of the consumer's request. If the services remain unavailable for longer than 15 days, the end user is entitled to terminate the contract free of charge (Article 129).

It should be noted that the new framework seems to "hold" operators directly liable for acts beyond their control, such as force majeure events.

#### What about the new special service level breach framework?

verall, any significant, continuous, or recurring discrepancy between the actual performance of the electronic communications services may be considered as a sufficient basis to terminate the contract free of charge (Article 130).

#### What changes regarding the contract holder could entitle the consumer to terminate the contract free of charge?

s discussed in Parliament, consumers may terminate contracts free of charge in the following instances (Article 136):

- permanent change of their place of residence without the operator being able to assure the service on the same conditions at the new address;
- emigration to a third country, although the law states that this must be unforeseeable;
- iii. unemployment due to redundancy not attributable to them and resulting in a loss of available monthly income; and
- iv. permanent or temporary (more than 60 days) incapacity for work, resulting in a loss of available monthly income.

Despite the soundness of the legislative solutions, the vagueness of the concepts used will most likely generate discussion.

## What events can entail the suspension or termination of the contracts free of charge to their holder?

n addition to the provisions on contract termination, the contract is suspended in the event of ( Article 137):

- i. loss of the location where the services are provided;
- ii. change of residence to a location outside of the national territory;
- absence from residence due to imprisonment, prolonged illness, dependency on care provided or to be provided by a third party; or
- iv. unemployment or sick leave.

Note that a suspension that lasts longer than 180 days will result in the termination of the contract.

## Can undertakings change contractual conditions without giving rise to a right to termination free of charge?

Yes, although on conditions that raise several practical questions, like broadly speaking (Article 135):

- i. they are exclusively for the benefit of the end user;
- ii. they have no "negative effect" on the end user; or

iii. they arise directly from the application of a legislative act. As was already the case under the previous Electronic Communications Act, the burden of proof for these facts lies with the undertaking seeking to change the contractual conditions.

#### What stands out in the new lock-in framework?

espite a wide array of critiques, the legislator has chosen as policy, to a certain extent, to continue the previous framework, although it has created new problems, especially when it comes to lockin extensions and renewed lock-in (having introduced the concepts of initial and subsequent lock-in). Lock-in periods of up to 24 months remain therefore a the possibility (Article 131). and the rationale of the framework continues to be based on the granting by the undertaking of consideration, duly identified and quantified in the contract, associated with:

- the subsidization of terminal equipment:
- ii. the installation of the service, where applicable;
- iii. the activation of the service or
- iv. other promotional conditions.

## Do the terms to calculate the compensation in the event of the consumer terminating the contract remain unchanged?

o. The framework features several important novelties of uncertain outlines and impacts, with emphasis on the provision that charges cannot exceed the lesser of the following amounts (Article 136.4):

- The advantage afforded to consumers, as identified, and quantified in the relevant contract, proportional to the remainder of the lock-in period; and
- ii. A percentage of the monthly payments to fall due and payable, which will vary according to whether the lock-in period is initial or subsequent, between a maximum of 50% and 30% respectively.

The rule remains (Article 136.6) that undertakings must keep telephone recordings generated with their customers, although limited to the concept of termination and for the period of limitation and expiry of the obligations arising from the contracts. Besides their poor legislative technique, these rules raise many doubts.

#### Does the unblocking of terminal equipment remain subject to Decree-Law 56/2010, of 1 June 2010?

o. The New Electronic Communications Act incorporates this framework, where, for example, the prohibition of charging any amounts upon the expiry of the lock-in period remains in force, as does the % charging cap during this period, but several other innovative aspects are introduced. Coordination with the framework laid down in Decree-Law 56/2010, of 1 June 2010, and not expressly repealed, appears problematic though.

Does the new framework on enduser rights apply only to contracts executed after the entry into force of the New Electronic Communications Act or also to pre-existing contracts?

s a rule, the new framework applies only to contracts executed after its entry into force, except in cases expressly provided for as having immediate application, such as (Article 9 of the preamble):

- i. the contract summary provision framework;
- ii. end-user protection rules regarding the end of the lock-in period;

- iii. billing free calls;
- iv. privacy matters regarding any end-user information after debts are settled;
- v. rules on service unavailability;
- vi. changes regarding the contract holder;
- vii. limitations on the charges payable in case of termination of the contract during the subsequent lock-in period without change of the local loop; and
- viii. rules on contract suspension and termination.

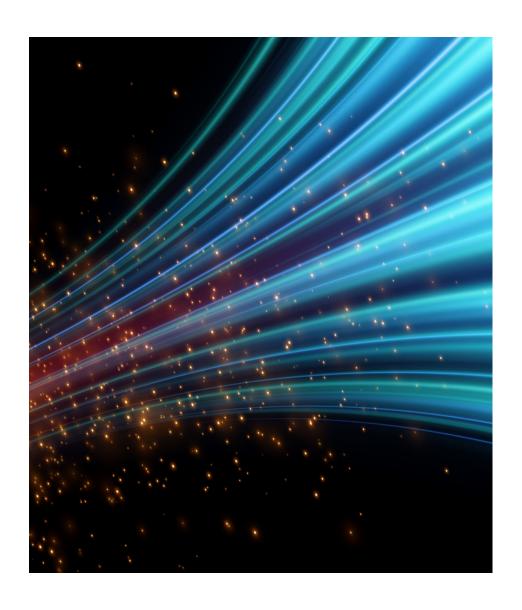
of services and changes to the contract that can lead to the termination of contracts free of charge.

There is no doubt that the enduser framework is among the most important in the New Electronic Communications Act and shows an increasing trend for the main foundation of regulation to be, effectively, the protection of users.

#### Key takeaways

ike the EECC, the New Electronic Communications Act pays particular attention to end-user rights, materially reinforcing the framework across the three typical dimensions:

- i. pre-procurement and procurement of services;
- ii. contract performance; and
- iii. contract termination. New specificities on service bundles are introduced and the subject of contract termination is reinforced, with relevant limitations in terms of compensations payable for the breach of lock-in periods. New rules are also introduced concerning the performance



# -04-

What changes?

### New Electronic Communications Act

Radio Spectrum

### -04-

#### **Radio Spectrum**

his text alludes to the framework applicable to radio spectrum, as foreseen in the New Electronic Communications Act, particularly in Articles 31 through 49. The main contrasts will be specifically highlighted by reference to the framework provided for in the previous Electronic Communications Act.

### What principles must ANACOM abide by regarding spectrum management?

As in the previous Electronic Communications Act, ANACOM, as the national regulatory authority, is the entity tasked with ensuring the efficient management of the radio spectrum, taking into account its social, cultural, and economic value and the fact that it belongs to the State's public domain (Article 32.1). The New Electronic Communications Act therefore vests in ANACOM the necessary powers to, among others,

ensure high-quality, high-speed wireless broadband coverage of the national territory and population, as well as of the main national transmission axes;

- ii. ensure predictability and consistency in the allocation, renewal, amendment, restriction, and withdrawal of rights of use of the radio spectrum, in order to promote long-term investment;
- iii. ensure the avoidance of harmful national or transnational interference by adopting appropriate preventive and remedial measures to that effect; and, a new feature of the New Electronic Communications Act;
- iv. promote the shared use of the radio spectrum in accordance with Competition Law.

### How were ANACOM's powers concerning spectrum management changed?

verall, ANACOM retains a significant part of the powers it had under the previous Electronic Communications Act, including to assign, amend, or renew rights of use, and to authorize the transmission and lease of rights of use. However, the New Electronic Communications Act significantly changes some more specific

aspects, both expanding and reducing ANACOM's powers. ANACOM has been given some new powers (to promote the shared use of spectrum, including passive and active infrastructures. and to ensure the simultaneous expiry of rights of use granted). On the other hand, the Regulator loses some of the powers it had under the previous framework (under the New Electronic Communications Act, all regulations concerning tenders or comparative selection procedures for the allocation of rights of use of frequencies must be approved by the member of the Government in charge of communications).

Following the EECC very closely, the New Electronic Communications Act expressly foresees the intervention of other appropriate authorities in sector regulation, including in matters of enduser rights, which is also noteworthy.

#### What are the conditions applicable to the use of radio spectrum?

n general, the use of the radio spectrum for the provision of electronic communications networks or services is subject to the conditions provided for the general authorization (Article 36.1). We refer to our text on the general authorization framework.

### What are the frameworks applicable to the allocation of radio spectrum use rights?

he New Electronic
Communications Act maintains
the two frameworks for granting
rights of use of frequencies already
provided for in the previous Electronic
Communications Act, applicable to
the conditional use spectrum, under
the National Frequency Allocation
Framework.

Rights of use may accordingly be granted (Articles 37.1 and 37.2): (i) as fully accessible, upon an application accompanied with information aimed at evaluating the granting of the right of use; or (ii) through tender or comparative selection procedures. These mechanisms must be open, objective, transparent, proportionate, and non-discriminatory.

#### What are tze conditions associated with rights of use?

he conditions associated with the rights of use are to be defined by ANACOM, which also establishes the criteria for evaluating compliance. These conditions should be proportionate, transparent, and non-discriminatory and could consist, for example, of

- i. coverage and service quality requirements;
- ii. the establishment of maximum right durations; or
- iii. obligations for the experimental use of spectrum.

This framework remains overall like its predecessor's. However, the novelty of ANACOM being able to impose, as a condition attached to rights of use, obligations to pool or share spectrum or to grant access to spectrum to other users in specific areas or at a national level is worth highlighting.

#### What is the framework applicable to the renewal of use rights?

The rules regarding the renewal of rights of use have undergone significant changes in the New Electronic Communications Act. While in the previous Electronic Communications Act, renewal depended exclusively on the initiative of the rights holder, the new act affords ANACOM the possibility of evaluating the need for renewal of its

own initiative.

The renewal of rights may also come at the initiative of their holder, who must apply to ANACOM at least 18 months and at most five years before the expiry date, which differs from the minimum one-year notice provided in the previous Electronic Communications Act. ANACOM must answer the application submitted within six calendar months as from the date it is received

In any case, the framework applicable to the renewal of rights is not entirely clear, and ANACOM may now seek to renew the rights in such a way as to ensure simultaneous expiry of the rights of different or the same holders.

Moreover, it should also be noted that, in the case of rights of use whose number has been limited, interested parties should have the opportunity to state their opinion on their renewal, within the scope of a public consultation procedure (Article 41).

#### How is the transfer and lease of rights of use treated?

he framework for the transfer and lease of rights of use of frequencies remains identical to that provided for in the previous Electronic Communications Act. As a rule, the holder of a right to use frequencies, wishing to transfer or lease this right, may do so by means

of a request submitted to ANACOM. This possibility will only be prohibited when such rights have been granted

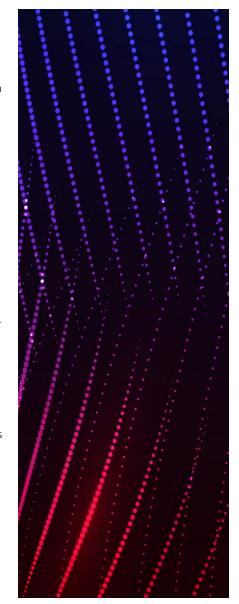
- i. free of charge or
- ii. for the provision of radio program services and distribution of television and radio program services, in the scope of specific procedures, for the fulfillment of general interest goals and ANACOM has established their non-transferability on these grounds.

The request must be submitted to the least onerous procedure possible, and ANACOM must state its position on it within 45 business days. In this evaluation, it is ANACOM's responsibility to ensure that the transfer or lease does not cause distortions of competition (Article 44).

### What are ANACOM's powers in terms of protecting competition in the use of spectrum?

he New Electronic
Communications Act establishes
ANACOM's obligation to
promote effective competition and
avoid distortions of competition in
the internal market, under Article 44,
which accurately reflects a point of
emphasis of the spectrum framework
under the European Electronic
Communications Code.

 In this regard, ANACOM's powers in terms of spectrum management have been



### -04-

strengthened and it may adopt or propose to other appropriate authorities suitable measures to prevent such distortions, such as limiting the number of spectrum bands for which rights of use are granted or attaching conditions to such rights;

- reserving part of a spectrum band or group of bands for allocation to new market entrants:
- iii. refuse to grant new rights of use or to allow new uses of spectrum in certain bands, and attach conditions to the granting of new rights of use or to new uses of radio spectrum, including transfer or lease, to avoid distortion of competition caused by the grant, transfer, or accumulation of rights of use;
- iv. prohibit or impose conditions on the transfer of rights of use where such transfer would significantly harm competition and is not subject to the national or Union merger control regime;
- amend rights of use where this is necessary to remedy a distortion of competition caused by the transfer or accumulation of rights of use.

These measures should be based on an objective and forward-looking assessment of the competitive conditions in the market and the need for measures to be taken to maintain or achieve effective competition, and their likely effect on current and future investments by market players, in particular in network roll-out.

#### What is the framework applicable to the shared use of spectrum?

nother novelty in the New Electronic Communications Act relates to the promotion of the shared use of the radio spectrum, defined by the New Electronic Communications Act as "the access by two or more users to the same bands of the radio spectrum, in the scope of the general authorisation or of rights of use of the radio spectrum, or in a combination thereof, in accordance with the sharing conditions associated with such rights, including under a sharing agreement". ANACOM is tasked with "ensuring the maximisation of the sharing of the radio spectrum" (Article 34.2(d)). This sharing regime applies not only to the spectrum itself, but also to the passive or active infrastructures that enable or support its use.

Although the New Electronic Communications Act does not expressly say so, it seems that the shared use of the spectrum can result from the initiative of the holders themselves, who, within the bounds of Competition Law and in compliance with the conditions associated with the rights of use, may promote sharing agreements among themselves. On the other hand, such configuration of spectrum use may also be determined by ANACOM, namely to ensure effective and efficient use of the radio spectrum, or to promote coverage (Article 39.5).

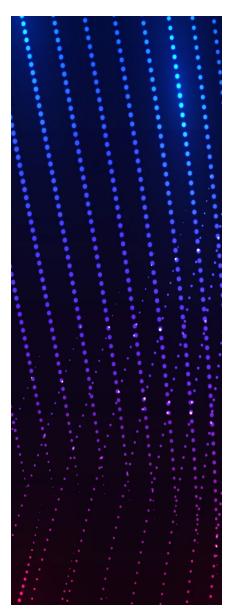
#### **Key Takeaways**

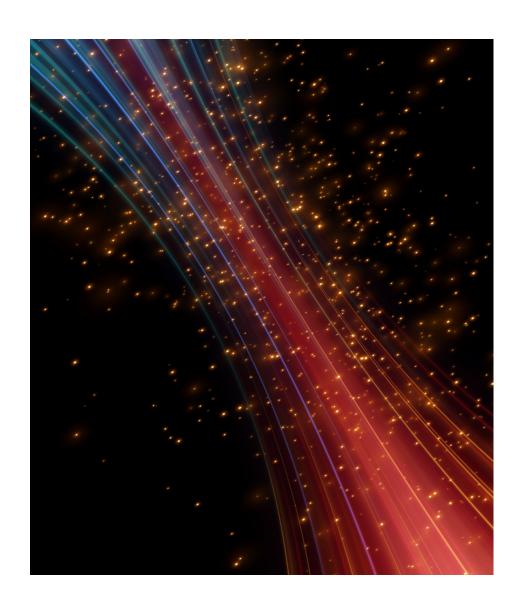
Although the cornerstone of the radio spectrum framework remains in place, the New Electronic Communications Act introduces significant changes to these rules, albeit only regarding a few specific matters.

The main innovations are related to ANACOM's powers and remit, whose role is reinforced in some matters (particularly regarding protection of the competitive use of spectrum) and curtailed in others.

Also of note is the introduction of the shared use of spectrum and the active and passive infrastructures that enable or support its use. The New Electronic Communications Act vests in ANACOM exclusive powers to impose it.

It will be interesting to follow ANACOM's performance in these matters, to understand whether this expansion of its powers will result in greater control over the activities of operators.





# -05-

What changes?

### New Electronic Communications Act

Interpersonal Communications Services

### **- 05 -**

#### **Interpersonal Communications Services**

This text seeks to provide information on the framework applicable to operators of inter-personal communications, covered by the New Electronic Communications Act.

#### What are interpersonal communications services?

This category includes services that cumulatively:

- allow direct, interpersonal, and interactive information exchange (excluding services where this interpersonal and interactive communication is a minor ancillary feature inextricably linked to another service - e.g. chat services associated with online games),
- ii. Through electronic communications networks,
- iii. Between a limited number of persons,
- iv. Whoever starts or participates in the communication can choose its recipients, and
- v. Are usually provided for a fee (either directly, by paying a price, or indirectly, through advertising revenue).

#### What types of interpersonal communications services are defined?

umber-based interpersonal communications services: connect or enable communication, using publicly assigned numbering resources (Article 3.1(uu)).

- i. Note that, according to Recital 18 of the EECC, the mere use of a number as an identifier is not enough per se to qualify a service as a number-based interpersonal communications service. This concept of "number-based interpersonal communications service" refers specifically to services where the number ensures connectivity or point-to-point connection, or
- allows contact with users who are holders of that number.

Many of the obligations foreseen for traditional electronic communications services will now apply to these services - as they are subject to the general authorization framework (Article 16.3) - since they benefit from numbering resources.

Number-independent interpersonal communications services: in contrast, these services do not allow for connection or communication with publicly assigned numbering resources (article 3.1(vv)) - these are

the typically called over-the-top or OTT services, which are now covered by several rules arising from the New Electronic Communications Act.



### **- 05 -**

### What are the main obligations of public interpersonal communications services operators?

part from micro-enterprises providing only number-independent interpersonal communications services (Article 110.1), operators of public interpersonal communications services must:

- i. Enforce end-user rights (described in more detail in the text on end-user rights);
- Provide use control mechanisms to consumers, micro-enterprises, small businesses, and non-profit organizations where services are billed on the basis of time or consumption volumes (Article 113.2(b));
- iii. Publish, in a clear, updated, comprehensive, and transparent manner, the terms and conditions applicable to its services, as well as the information set out in Schedule I (Article 116.1); and
- iv. Publish, at ANACOM's request, complete, comparable, and updated information on the quality of the service provided and on measures taken to ensure access for disabled end-users (Article 117).

## What are the main obligations specifically applicable to public number-based interpersonal communications services operators?

- Abide by the general authorization framework - already provided for in the previous Electronic Communications Act, even though its application to these operators was not clear (Article 16.2);
- ii. Comply with the general conditions defined by ANACOM in connection with the general authorization framework (we refer, in this regard, to the text on the general authorization framework), including (Article 27):
  - a. access obligations;
  - b. obligations of interconnection of networks and interoperability of services;
  - obligations regarding the processing of personal data and the protection of privacy in the electronic communications sector; or
  - d. obligations regarding the security and integrity of public electronic communications networks;

- iii. Allow free connection to emergency services (112) (article 67.1) and provide information related to civil defense or of public interest (articles 68.1 and 119);
- iv. Detail in the relevant monthly invoices:
  - a. the services provided and their prices, and
  - the remaining lock-in period, as well as the price associated with the termination of the contract (Article 122);
- v. Comply with end-user and consumer notification obligations, before service provision is suspended (Articles 127 and 128);
- vi. Credit the amount corresponding to the periods of unavailability of the service to the end user, even if the latter does not request it (Article 129); and
- vii. Provide an offer not subject to a lock-in period and, if they wish to simultaneously submit offers with lock-in periods, limit these to 6, 12, or 24 months (Article 131).

### Can access and interconnection obligations be imposed on operators providing these services?

s for operators providing number-based services, since they are subject to the general authorization regime, an access and interconnection obligation may be imposed to ensure:

- i. end-to-end connectivity, or
- ii. the interoperability of services (Article 103.1 (a) and (b)) this obligation already applied to operators of traditional electronic communications services, and it remains to be seen how it will apply to the new services covered.

As for undertakings providing number-independent interpersonal services, these obligations can only be imposed by ANACOM to ensure interoperability, when the undertakings reach a significant level of coverage and number of end users and upon a decision by the European Commission to this effect (Articles 103.1(d) and 103.2).

#### What are the consequences of breaching such obligations?

Failure to comply with the applicable obligations may entail

- i. civil liability, based on the breach of the end users' rights, as well as
- ii. misdemeanor liability (Articles 178 and 179).

#### Key takeaways

The New Electronic Communications Act introduces significant changes to the provision of interpersonal communications services – services that, at least in most cases, were not covered by the previous legal framework.

Undertakings providing these services are subject to various obligations and conditions in their activity that did not result from the previous Electronic Communications Act, and that, to ensure greater legal certainty and clarity as to the OTT services' framework, became a reality with the approval of the EECC.

We underline the framework applicable from now on to operators of number-based interpersonal

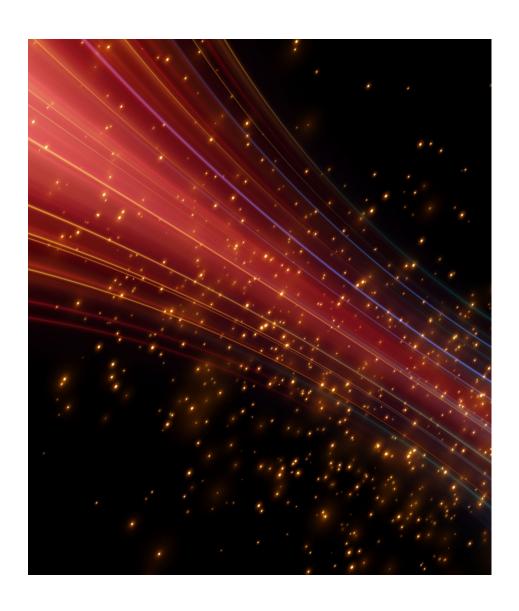
communications services. These operators are now subject to the general authorization regime, which puts them on a par with traditional electronic communications service operators – a clear reflection of their importance and growth in the market. This equivalence carries regulatory obligations with it, applicable not only to their relationship with ANACOM, but also obligations towards the consumer/end user.

Operators of number-independent interpersonal communications services will also have specific obligations, particularly regarding the protection of

end users.

It is therefore important that the providers of these services adapt their practices, systems, and procedures to be ready for the new regulatory framework applicable to their activity in Portugal.





# -06 -

What changes?

### New Electronic Communications Act

Regulatory Obligations

### **-06**-

#### **Regulatory Obligations**

his text aims to highlight the main aspects related to the regulatory obligations contained in the New Electronic Communications Act. References will occasionally be made to the previous Electronic Communications Act and to the European Electronic Communications Code, as provided in Articles 84 through 108.

#### Was there any change to the concept of significant market power?

here was no specific change to the definition of the concept of significant market power (Article 78), and the classic definition was kept that associates this concept to the existence of a position of economic strength that allows an entity to act, to a large extent, independently of competitors, customers and consumers.



## What obligations does the New Electronic Communications Act imposes on undertakings with significant market power?

The New Electronic Communications Act establishes several obligations (Article 84) for operators with significant market power ("SMPU") that is in keeping with what was already provided for in the previous Electronic Communications Act. New features include:

- the obligation to respond to reasonable requests for access and use of infrastructure (civil engineering assets);
- commitments to co-invest in new elements of very high capacity networks; and
- iii. obligations imposed on wholesale-only undertakings.

### Is ANACOM bound to follow a hierarchy to impose regulatory remedies to SMPU?

es. A paradigmatic case is the access to civil engineering assets held by SMPU (Article 89). ANACOM may impose on SMPU the obligation to respond to reasonable requests for access and

use of this type of infrastructure. The undertakings need not operate in the same relevant market. This results from the understanding that, regardless of the market in which they operate, the use and reuse of civil engineering assets can lead to significant savings when developing new products and innovative technical solutions, to the ultimate benefit of market competition.

The primacy in the application of this obligation does not preclude the application of the remaining obligations, whose structure and letter, with rare exceptions, remain unchanged from the previous Electronic Communications Act.

#### Can ANACOM impose price control and cost accounting obligations?

n the absence of effective competition (Article 92), ANACOM may impose obligations to earmark prices for costs and the obligation to adopt cost accounting systems regarding the provision of specific types of interconnection and access. However, the New Electronic Communications Act imposes more stringent conditions for the

### -06-

application of these obligations. ANACOM should therefore take into account the benefits arising from predictable and stable wholesale prices that ensure efficient market entry and ensure that there are sufficient incentives for undertakings to implement new and more advanced networks, including in areas of low population density, where the respective supply incentives will be lower.

### What obligations can be imposed on wholesale-only undertakings?

ike the EECC, the New Electronic Communications Act considers that, in certain cases, the creation of a true wholesale market may leverage positive effects on competition in downstream retail markets and may also involve lower competitive risks.

As a rule, only non-discrimination obligations, access to, and use of specific network elements and associated facilities, or obligations concerning fair, equitable, and reasonable pricing (non-earmarking of prices for costs) can be imposed on wholesale-only undertakings (Article 101). The application of this more

favorable arrangement depends on the specific undertaking's cumulative compliance with several strict requirements, which raises questions about the practical applicability of this arrangement.

### Are SMPU subject to specific obligations within the context of infrastructure migration?

n a market driven by innovation, the legislator paid particular attention to the migration processes from the old copper networks to the next generation networks, considering the general consequences for competition. The New Electronic Communications Act now provides for a prior notice mechanism (Article 102) whenever such undertakings plan to decommission or replace parts of the network with new infrastructure (even if it involves pre-existing infrastructure).

#### Do access obligations apply only to SMPU?

o. This is an important novelty introduced by the Electronic Communications Act. Based on arguments of economic efficiency

and absence of need for replication of physical resources, ANACOM may now impose access obligations on operators or owners of cabling and associated related resources inside buildings or up to the first distribution point, when this is located outside the building, whether or not they are SMPU (Article 104). The new act thus significantly strengthens the so-called symmetric regulation, applicable to all operators (as opposed to asymmetric regulation, applicable only to SMPU).

#### What is localized roaming and can ANACOM impose this obligation?

ocalized roaming is a new feature of the New Electronic Communications Act (article 105), and is a regulatory remedy capable of overcoming "(...) insurmountable economic or physical obstacles for providing end-users with services or networks which rely on the use of radio spectrum (...)" (Recital 158 of the EECC). In certain cases, ANACOM may then impose obligations for sharing active infrastructures or the obligation to sign access agreements for localized roaming purposes.

The use of this mechanism is only warranted when there is a proven

insufficiency of access and sharing of passive infrastructure. However, its imposition will depend on the cumulative fulfillment of several requirements and conditions, including the existence of insurmountable physical or economic obstacles, thus resulting in very poor or non-existent access to the network or access to services by end users (which may happen, for example, in the case of building limitations in protected areas).

### What are co-investment agreements in very high capacity network elements?

The development of new, very highcapacity network elements involves large investments. Co-investment agreements provide significant benefits in terms of cost and risk sharing and can be of the following types:

- i. Network asset co-ownership;
- Long-term risk sharing through co-financing or purchasing agreements leading to specific structural rights in favor of other undertakings providing electronic communications networks or services.

### -06-

In order to benefit from a more favorable regulatory arrangement, co-investment agreements are subject to the performance of several obligations, including, their opening, during the useful life of the network built, to any undertaking providing electronic communications networks or services (notwithstanding the possible establishment of obligations by the SMPU) and transparency criteria (Articles 96 and 97), all of which will be assessed by ANACOM when evaluating the relevant agreement.

### What is the regulatory framework of co-investment agreements?

he new Electronic Communications Act uses, in a somewhat innovative way, the protection remedies typically associated with Competition Law, namely the so-called regulation by commitments.

When evaluating the compromise proposal, ANACOM must not only comply with various criteria, but also conduct a market test and public consultation. Once the procedure is concluded, ANACOM may adopt a decision making the commitment binding in whole or in part, thereby leading to refraining from imposing

heterogeneous regulatory obligations. Note that the establishment of commitments is not a remedy exclusively related to co-investment agreements. It may also apply either in the context of cooperation agreements or in the context of agreements providing for effective and non-discriminatory third-party access to the network of vertically integrated undertakings with significant market power in one or more relevant markets.

#### Key Takeaways

Like the EECC, the New Electronic Communications Act maintains the typical menu of regulatory obligations, adding some novelties that arise from a greater maturity of the markets and the need to boost investment. The greatest example of this rationale is the regulatory framework applicable to very high capacity networks.

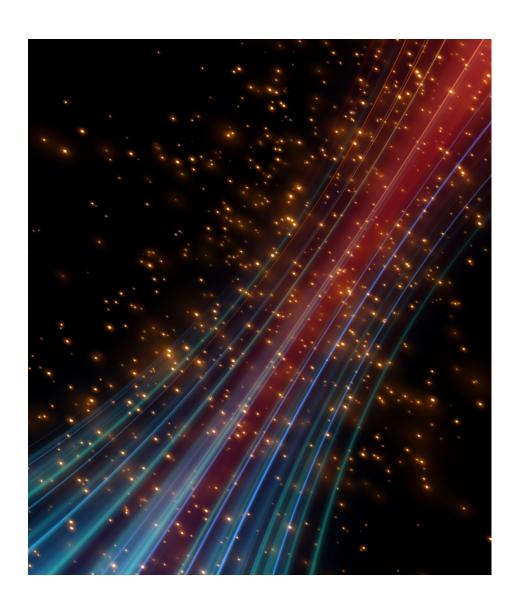
At the same time, the New Electronic Communications Act reinforces a potential imposition of symmetrical regulatory obligations, notably access, and strengthens ANACOM's power to enforce access to civil engineering assets and localized roaming.

Despite the increased powers, the imposition of regulatory obligations



becomes predicated on the fulfillment of more requirements and their interconnection and interdependence is more complex.

Thus, despite the soundness of the new framework, its complexity raises legitimate doubts about its applicability in the domestic market.



# **- 07 -**

What changes?

### New Electronic Communications Act

Security of Electronic Communications Networks and Services

### Security of Electronic Communications Networks and Services

Introducing the most salient rules and updates regarding the security of networks and services brought in by Articles 59 et seq. of the New Electronic Communications Act, applicable to undertakings providing public electronic communications networks or services.

#### How does the New Electronic Communications Act define security of networks and services?

rticle 3(1)(pp) of the New Electronic Communications Act defines 'security of networks and services' as "the ability of electronic communications networks and services to resist, at a given level of confidence, any action that compromises the availability, authenticity, integrity or confidentiality of those networks and services, of stored or transmitted or processed data, or of the related services offered by, or accessible via, those electronic communications networks or services".

The new aAct therefore adopts the definition contained in ANACOM Regulation 303/2019, on the security and integrity of electronic communications networks and

services

What major updates does the New Electronic Communications Act bring regarding the security of networks and services?

hile substantially keeping its predecessor's security obligations and rules, namely general security obligations, implementation measures, additional requirements, audit-related provisions, and binding instructions, the New Electronic Communications Act brings significant updates.

The New Electronic Communications Act is more detailed and stricter than its predecessor regarding obligations, implementation measures, and security requirements, which it has buttressed and fleshed out.

Security incident-related provisions were extensively amended to bolster and consolidate the notification requirements incumbent upon undertakings, and to streamline coordination and cooperation between regulators and other entities outside the sector.

The New Electronic Communications Act also creates a mechanism to assist and cooperate with the Equipa de Resposta a Incidentes de Segurança Informática Nacional [Portuguese IT Security Incident Response Team] and expressly foresees consulting and cooperating with other entities, such as courts and the police, the Centro Nacional de Cibersegurança [Portuguese Cybersecurity Centre] ("CNCS") and the Comissão Nacional de Proteção de Dados [Portuguese Data Protection Commission] ("CNPD").

Under the New Electronic Communications Act, the use of equipment in electronic communications networks is sometimes predicated on a security assessment to be conducted by a Security Assessment Commission set up under the auspices of the Conselho Superior de Segurança do Ciberespaço [Cyberspace Security Council].



### What are the key general obligations regarding the security of networks and services?

s in the previous framework, undertakings must implement technical and organisational measures to ensure a security level commensurate to the risks posed to the security of networks and services (Article 59).

Such measures must specifically prevent or minimise the impact of possible security incidents on users and other networks and services, taking account of the state of the art and any information, guidelines, assessments, and decisions of any relevant national, EU, or international entities.

However, the new Act innovates with respect to its predecessor, in that it requires such measures to be concordant with specific security aspects. Both undertakings and ANACOM must, among other things, consider: (i) the security and integrity of the networks and resources, including physical and environmental security, and network access control; (ii) the management and detection of security incidents and how they will be notified and reported to the relevant entities and

the public; (iii) business continuity management, including business continuity strategies, contingency and recovery plans; and (iv) the monitoring, auditing and testing, including contingency planning exercises, of security assessments and compliance monitoring (Article 59(3)).

Also of note is the express provision for ANACOM to issue binding instructions on measures to prevent the occurrence and ensure the resolution of security incidents.

### What are the key specific obligations regarding the security of networks and services?

he New Electronic Communications Act requires compliance with technical implementation measures, additional requirements and security procedures, which will subsequently be implemented and approved by ANACOM, in keeping with the previous framework. It also imposes new and more specific measures not contained in the previous act nor in Regulation 303/2019. For example, the Act stipulates: (i) specific conditions to virtualise network features; (ii) conditions for the outsourcing of features; (iii) the adoption of supplier diversification strategies; and (iv) the siting of the network operation centre and security operation centre in national territory or in the territory of a EU member state.

Another fundamental aspect introduced by the New Electronic Communications Act is the requirement for a prior binding opinion from the CNCS to approve any implementation measures and/or to define the circumstances, format, and procedures applicable to security incident notification obligations.

#### How does the New Electronic Communications Act define security incidents?

security incident is defined as an "event having an actual adverse effect on the security of electronic communications networks or services" (Article 3(1)(m)). Although slightly different, this definition basically matches the definition contained in Regulation 303/2019 (the part reading "including a security breach or loss of integrity" was dropped). Despite the similarity between concepts, security incident-related provisions were extensively amended.

### What entities need to be notified of security incidents under the New Electronic Communications Act?

ndertakings are required to notify ANACOM and CNCS without undue delay of any security incidents having a significant impact on the operation of networks or services, and to inform the public if ordered by ANACOM (Article 60). The new framework further vests in ANACOM powers to directly inform the other relevant national authorities, including courts, the police and the CNPD, which will have practical consequences for undertakings, notably where the security incident at issue involves a personal data incident.

The requirement to notify the CNCS is a striking and noteworthy update, insofar as Regulation no. 303/2019 only states, with regard to this matter, that: (i) compliance with the obligation to notify ANACOM is without prejudice to the notification of incidents to other relevant authorities, such as the Public Prosecutor's Office, the CNCS, the CNPD and other regional, local, and sectoral authorities; and that (ii) ANACOM may, in cooperation with other relevant authorities.



make recommendations as to how the different applicable notification procedures should be coordinated.

### What does an incident with a significant impact on the operation of networks or services mean?

he New Electronic
Communications Act sets forth
an illustrative list of criteria to
define the circumstances in which
a security incident has a significant
impact (and which must be considered
by ANACOM in its assessment). Such
criteria essentially correspond to factors
and circumstances that already seem to
be covered by the letter of Regulation
303/2019. Below is a list of the
applicable criteria (Article 61(3)):

- i. The number of impacted users;
- ii. The duration of the incident:
- iii. The geographical distribution and size of the impacted area(s);
- iv. The extent to which the network or service operation is impacted;
- v. The extent of the impact on economic and social activities, including in connection with access to emergency services.

#### Are operators required to inform users affected by security incidents?

n a departure from the previous framework, operators are required, in the event of a specific and significant threat of a security incident, to inform potentially affected users, free of charge, of any possible preventive or response measures they may take and, if appropriate, inform of the threat itself (Article 60(2)).

Note that this obligation involves the requirement to inform users of both the occurrence and threat of an incident. Since the New Electronic Communications Act does not define the concept of 'specific and significant threat', its exact scope is unclear at this point.

### How compatible are Regulation 303/2019 and the New Electronic Communications Act?

As a rule, the New Electronic Communications Act contains obligations and provisions already existing in Regulation 303/2019, which was enacted under the previous act to implement the general obligations and implementation measures provided for therein, including regarding the notification of security incidents. However, seeing as the New Electronic Communications Act:

 Establishes that the approval of technical implementation measures and of measures defining the circumstances and procedures related to security incident notification obligations is subject to

- a prior binding opinion of the CNCS;
- Introduces new obligations and implementation measures, such as the obligations to notify incidents to the CNCS, to inform users of security incident threats, or to satisfy specific conditions for the virtualisation of network functions; and
- ii. Makes provision for ANACOM to issue binding instructions, particularly on the prevention and mitigation of security incidents, and to approve the regulations necessary to implement the New Electronic Communications Act;
- iv. and given the need for coordination with the CNCS, as well as the need to implement obligations and implementation measures that depart from the previous act, it is likely that Regulation 303/2019 will be recast or a new regulation approved to accommodate new legislative developments on integrity and security.

Questions remain, however, as to how the solutions raised by the new framework will be brought into line with, and whether these changes will entail the partial or total repeal of existing integrity and security provisions under Regulation 303/2019, which remain in force until they are replaced or repealed (Article 10(2)).

### -07-

#### Key takeaways

In keeping with the provisions of the EECC and bearing in mind the current risks and realities of the electronic communications sector and of our economic and technological context, the New Electronic Communications Act introduces new precautions and obligations regarding security and security incidents.

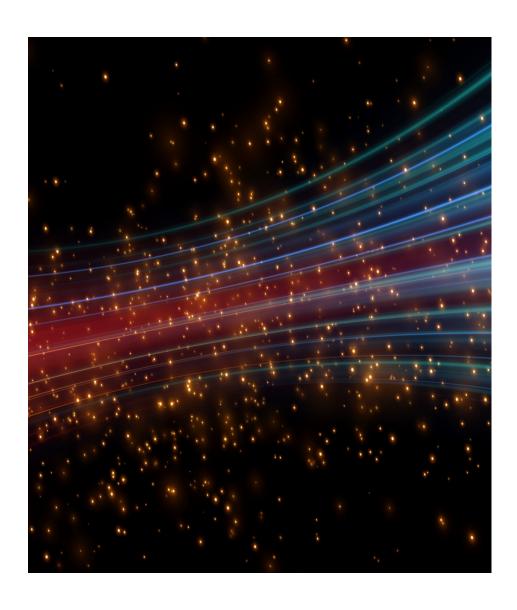
Following a burgeoning legislative and regulatory trend focusing on security and cybersecurity, the New Electronic Communications Act seems to embark on a first attempt to reconcile a myriad of legislative instruments and regulatory authorities that, although distinct, ultimately intersect around this issue.

For now, it is uncertain how the different legal instruments and obligations will be brought into line, and how the actions and powers of the relevant regulatory authorities will be coordinated. The multiplicity of potentially applicable legal

provisions – for example, the personal data protection framework, the legal framework for cyberspace security and the framework applicable to critical infrastructures – and the proliferation of authorities and entities with powers in the matter (namely ANACOM, CNPD, CNCS and the National Council for Civil Emergency Planning) are particularly noteworthy.

The New Electronic Communications Act involves a significant set of provisions and relevant entities whose interpretation and construction will not be easy.





# -08 -

What changes?

### New Electronic Communications Act

Fees

-08-

#### Fees

Introducing some of the main key rules regarding fees, contained in Articles 167, 168 and 169 (among others) of the New Electronic Communications Act

Does the New Electronic Communications Act significantly depart from the fee scheme established by the previous Electronic Communications Act?

he answer is no. The New Electronic Communications Act does not materially depart from its predecessor as regards fees. Organisation-wise, the New Electronic Communications Act dedicates one Article to each main fee:

- The annual fee payable by undertakings providing electronic communications networks and services covered by the general authorisation framework, commonly known as the regulatory fee (Article 167);
- Fees payable for the use of radio spectrum and numbering resources (Article 168); and
- iii. The fee for granting rights of way (Article 169).



#### Who is subject to the regulatory fee and what are its main features?

ndertakings providing electronic communications networks and services covered by the general authorisation framework (we refer to the above text on the general authorisation framework) must pay the regulatory fee, which therefore includes both offers accessible and not accessible to the public.

The amount of the fee, its periodicity, and any exemptions or reductions, as well as the periods of validity and the upper and lower collection thresholds, are currently set forth in Ordinance 1473–B/2008, of 17 December 2008, as amended from time to time ("Ordinance").

Pursuant to this Ordinance, the regulatory fee is assessed in September of each calendar year and operators must send ANACOM, by 30 June of each calendar year, a statement indicating the amount of relevant income directly earned from the performance of the activity in the previous calendar year.

The annual fee is calculated based on the administrative costs of regulation, i.e., management, control

and enforcement of the general authorisation framework, as well as user rights and specific conditions. These administrative regulatory costs are limited to those already provided for in Article 12 of the Authorisation Directive (now established in Article 16 EECC). In our view, they do not include expenses with provisions for ongoing legal proceedings, provided for in the formula to calculate the regulatory fee applicable to operators who, according to their relevant income and paragraph 1 of Annex II of the Ordinance, are included in bracket 2.

Transposing the provisions of the EECC, the New Electronic Communications Act provides that the regulatory fee will not apply to undertakings whose turnover is below a certain ceiling, whose activities do not reach a minimum market share, or which have a very limited territorial scope. Although this rule is already somewhat materialised in the Ordinance, it still needs to be implemented.

ANACOM remains under an obligation to publish an annual report of its administrative costs and the aggregate regulatory fees collected. Any difference between these amounts will need to be adjusted.

### What rules apply to the fees payable for the use of radio spectrum and numbering resources?

egarding radio spectrum, the assignment and renewal of rights of use, as well as the use of the spectrum itself, are subject to the payment of fees. The allocation, reservation, renewal and use of numbering resources are also subject to payment.

The applicable amounts, periodicity, and any exemptions or reductions of these fees, as well as the periods of validity and the upper and lower collection thresholds, are currently set forth in the Ordinance.

#### How should the fees payable for the use of radio spectrum be set?

he New Electronic
Communications Act updates
the fees payable for the use of
radio spectrum. Transposing Article
42/2 EECC, it stipulates that the fees
applicable to spectrum use rights
must be set at a level that ensures
the efficient allocation, renewal and
use of the spectrum, in particular by:
(i) establishing reservation prices as
a floor price, considering the value
of such rights in their potential
alternative use; (ii) taking into account
the additional costs arising from

the conditions attached to such rights; and (iii) applying, to the extent possible, payment schemes linked to the spectrum's actual availability for use.

The amount of these fees should also consider the values defined by ANACOM for reservation prices, the evaluation of the additional costs of the conditions attached to rights of use and the effective availability of the spectrum.

### Which framework applies to fees payable for the granting of rights of way?

he New Electronic
Communications Act takes up
the principle already enshrined in
its predecessor, whereby fees payable
for rights of way should reflect
the need to ensure optimal use of
resources and be objectively justified,
proportionate, transparent and nondiscriminatory.

A municipal fee for rights of way ("TMDP") and remuneration for the use of infrastructures capable of housing electronic communications networks belonging to the public or private domain of local authorities, as set forth in Decree-Law 123/2009, of 21 May 2009, may lead to the creation of a municipal fee for rights of way, the rights and charges relating



to the implementation, roll-out and crossing of the public and private municipal domains by systems, equipment and other resources of undertakings offering public electronic communications networks and publicly available electronic communications services at a fixed location.

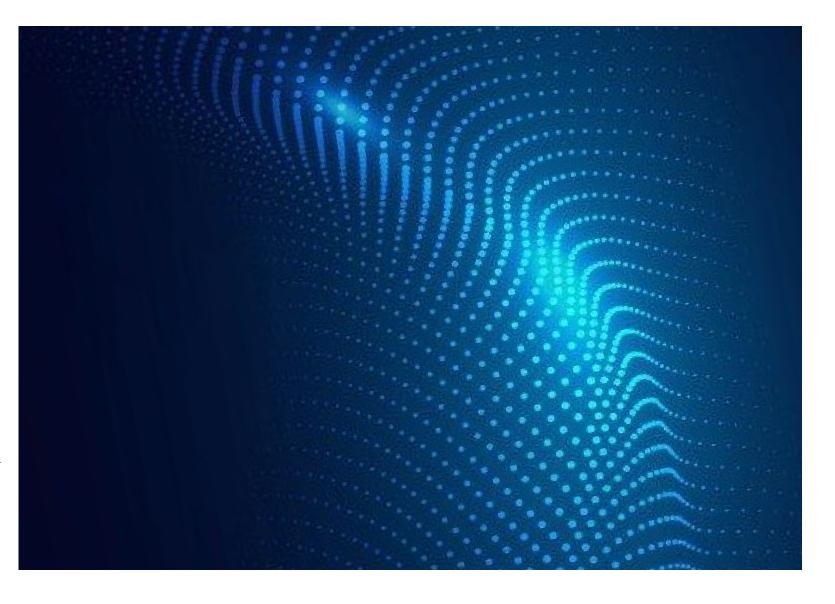
The principles already applicable to the TMDP also remain in place. The TMDP is thus determined by applying a percentage on the total monthly billing issued by the undertakings that offer publicly accessible electronic communications networks and services, at a fixed location, to all end customers of the municipality in question. This percentage, which cannot exceed 0.25%, is approved annually by each municipality, by the end of December of the year prior to its applicability. In the municipalities where collection of the TMDP is approved, the undertakings offering publicly accessible electronic communications networks and services at a fixed location must pay this tax. Conversely, in keeping with the framework in place under the previous Electronic Communications Act, no fees or other charges may be levied for the implementation, roll-out or crossing of the public and

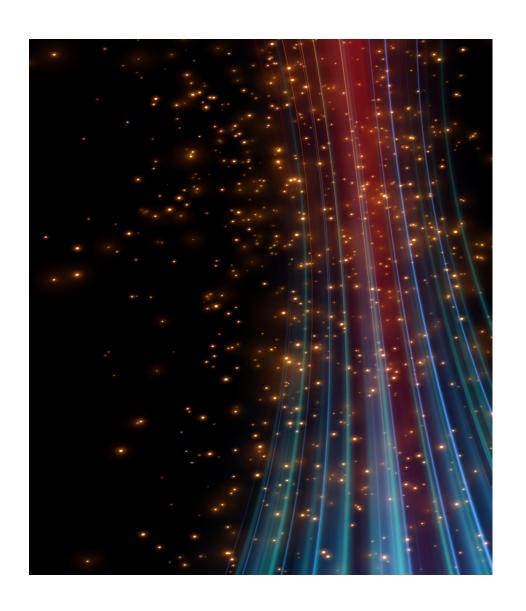
private domains of the State and the autonomous regions, on the surface or underground, by systems, equipment and other physical resources necessary for their activity. ANACOM remains tasked with approving the regulation establishing the rules and procedures to ascertain, assess and remit the TMDP, a task it currently performs under ANACOM Regulation 300/2009, of 15 July 2009.

## Key takeaways

As expected, the New Electronic Communications Act does not significantly change the applicable fee scheme.

However, the annual fee payable by undertakings offering electronic communications networks and services covered by the general authorisation regime (regulatory fee), the fees payable for the use of radio spectrum and numbering resources, and the fees for the granting of rights of way are set out in separate Articles of the New Electronic Communications Act, making it easier to understand the rules applicable to each.





# -09 -

What changes?

## New Electronic Communications Act

Universal Service

# -09-

## Serviço Universal

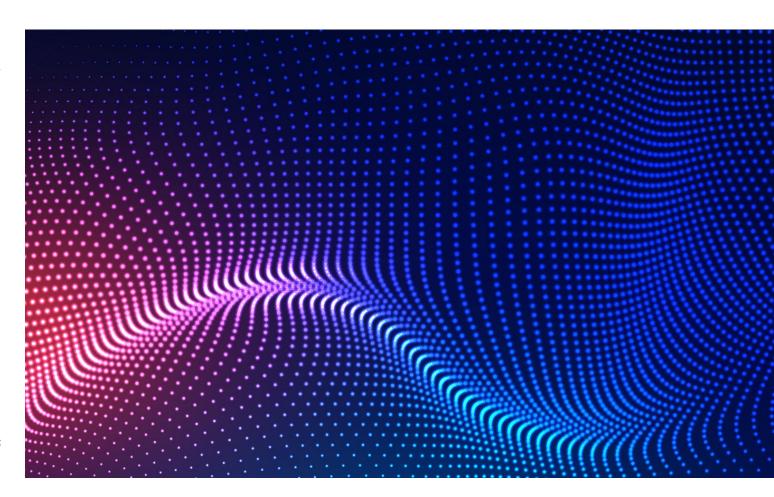
Reviewing the most relevant rules on the provision of the universal service ("US") under Articles 147 through 161 of the New Electronic Communications Act.

#### What is the US?

he US is the "minimum set of provisions (...) which must be made available, at an affordable price, in the national territory to all consumers, according to the specific national conditions, whenever there is a risk of social exclusion resulting from the lack of such access that prevents citizens from fully participating in the social and economic life of society" (Article 147(1)).

In essence, it involves the provision of one or more services that the legislator deemed essential to make available, at a given time, to all users, regardless of their social and economic conditions. The US is, in other words, the 'last stronghold' – or a "safety net", as stated in Recital 212 EECC – of electronic communications services that must exist and be provided at affordable prices and throughout the territory.

What services are included in the US? Considering the technological evolution of the last decades, it would be fitting that the New Electronic Communications Act would, in line with that foreseen in the EECC in this respect (especially in



# -09-

Article 84), update the services that should be included in this concept, by reference to the framework foreseen in its predecessor.

The concept of US accordingly includes (i) "an adequate broadband internet access service at a fixed location"; (ii) "voice communications services, including the underlying connection, at a fixed location"; and (iii) "specific measures for consumers with disabilities, in order to ensure equivalent access to the services which are available to other users as part of the universal service" (Article 148).

Although this issue was already addressed in the previous Electronic Communications Act, it is noteworthy that the New Electronic Communications Act includes specific measures for users with disabilities as part of the US itself.

As for the remaining services included in the US, they were similarly already foreseen in the previous Electronic Communications Act, although "broadband internet access" (and no longer mere "connection to a public communications network at a fixed location") is now foreseen and the concept of 'underlying connection' has been added to the scope of voice communications services.

However, the new framework removed two services from the

scope of the US: (i) the provision of a comprehensive telephone directory and directory enquiry service; and (ii) the adequate provision of public payphones, which is understandable given the continuous drop in the use of these services, despite their occasional relevance in certain locations. Although these services have been removed from the scope of the US, there is nothing to prevent them from continuing to be provided.

#### Who benefits from the US?

s already mentioned, the purpose of the US is to ensure that the entire population has access to the minimum set of services included in this scope. While all users can theoretically benefit from the US, the truth is that it mainly benefits those who have difficulty "participating fully in the social and economic life of society", typically those who live in more remote areas or have more pronounced financial difficulties.

In any case, according to the EECC (Article 84(5)), the New Electronic Communications Act (Article 148(4)) gives the Government the power to extend the scope of the US to end users that are micro, small and medium-sized enterprises and non-profit organisations, thus extending

the range of potential beneficiaries of the US.

The extension of regulatory measures of a more social nature to these entities is, in fact, one of the most innovative features of the New Electronic Communications Act

## What specific measures are brought in for citizens with disabilities?

t is the Government's remit to adopt the specific measures foreseen for citizens with disabilities, while ANACOM is tasked with evaluating the conditions for ensuring access to the US in the national territory by consumers with disabilities and proposing to the Government the measures it deems appropriate to ensure equivalent access for those users (Article 154).

ANACOM can propose that the Government adopt specific measures and provide, free of charge or at affordable prices, related terminal equipment, as well as (i) integrated voice and retransmission services; (ii) handset amplifier equipment, so as to increase the volume of the handset, for persons with hearing disabilities; (iii) luminous call alerts, namely a device that activates a visual signal when the terminal equipment receives a call; (iv) simple braille invoices; (v) fixed destination calls, allowing calls to be automatically established to a preset number defined by the

customer; (vi) the possibility of making free calls to a preset number for directory information services; and (vii) customer support lines in Portuguese Sign Language, when warranted

#### How are US providers selected?

here is no significant departure from the previous framework. If the Government decides to impose obligations to ensure the availability of an adequate broadband internet access service and voice communications service for end users at a fixed location, it may appoint one or more undertakings to guarantee such availability throughout the national territory (Article 161). The undertakings responsible for providing the US should be selected through an effective, objective, transparent, proportionate and nondiscriminatory procedure ensuring that all undertakings start on a level playing field and that the US is provided in a cost-effective manner.

# Who funds the US and how are any net costs incurred in the provision of the US offset?

s already established in the new Act's predecessor, ANACOM is tasked with checking whether the provision of the US is an excessive burden for the providers of this service, and with defining the concept of 'excessive burden' (see *footnote 1*) (Article 157 et seq.).

In the event of excessive burden, under the terms to be defined by ANACOM, the rules for calculating the net cost set out in Article 158 of the New Electronic Communications Act should be followed, broadly in line with that established in its predecessor.

Once the net cost has been calculated and ANACOM concludes that the US provider is subject to an excessive burden, it is incumbent on the Government to promote adequate offset through one or both of the following mechanisms: (i) offset from public funds; and (ii) allocation of the cost among undertakings offering electronic communications networks and services within the national territory (whereas, under the previous act, only undertakings offering electronic communications networks and services accessible to the public within the national territory contributed to the offset fund). An offset fund administered by ANACOM or by another independent body designated by the Government is thus established for this purpose.

# Does the US still fulfil its "social regulation" function under the New Electronic Communications Act?

s mentioned here, the "social regulation" function in electronic communications – which typically used to be the remit of US providers, given its intrinsic nature and underlying principles, especially that of accessibility – is now mainly ensured by the internet social tariff scheme, enacted by Decree-Law 66/2021, of 30 July 2021 ("DL 66/2021").

By redefining the scope of the US and creating the internet social tariff, its importance has dramatically decreased, with the internet social tariff making it possible to almost fully ensure the fulfilment of the underlying objectives of the US.

This primarily arises from three considerations:

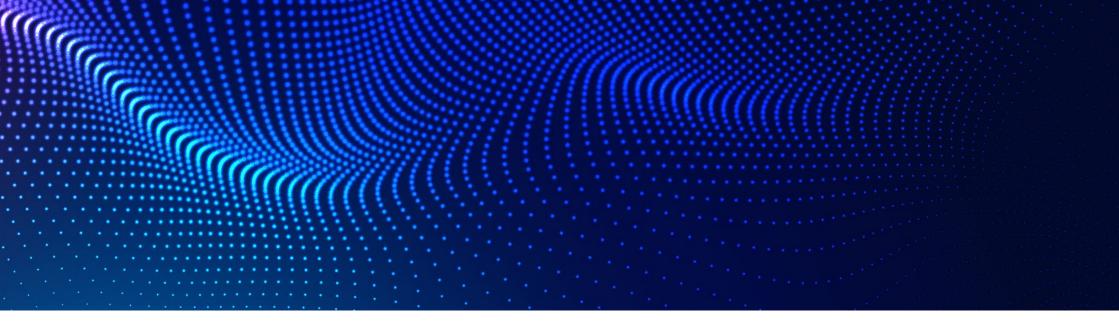
- i. On the one hand, the most socially relevant service included in the scope of the US is arguably the "adequate service of broadband internet access at a fixed location", which is already ensured by the internet social tariff as evidenced by DL 66/2021. The internet social tariff allows consumers on low incomes or with special social needs to benefit from broadband internet access at a reduced price;
- ii. On the other hand, the catalogue



- of minimum guaranteed services resulting from the provision of broadband internet access service at a fixed location, provided for in the New Electronic Communications Act (Article 149/2), is the same as the catalogue of minimum services resulting from the provision of the internet social tariff (see footnote 2) (Article 3(1) of DL 66/2021); and iii. Lastly, the prices charged to users for the provision of the US should be affordable (and regularly monitored
- i. Lastly, the prices charged to users for the provision of the US should be affordable (and regularly monitored by ANACOM), a principle also adopted by the internet social tariff regulation. Tariffs are defined by an ordinance of the member of the Government responsible for digital transition, following a reasoned and non-binding proposal issued by ANACOM (see footnote 3).

In addition to these aspects, it must also be noted that upcoming tenders for the coverage of very high-capacity public electronic communications networks in "'white areas'" – i.e., areas of the country where there is no penetration of these electronic communications networks – are expected to push the US further into obscurity.

The internet social tariff, which to some extent was a precursor to the New Electronic Communications Act, now pursues the main goals of the US. As such, it is unclear what role the



US will play under the New Electronic Communications Act, with everything suggesting that it may be a chapter of little practical application. parallel development in the sector: the approval of the internet social tariff brought in the large slice of "social regulation" that previously fell upon the US and ends up fulfilling the goals that have always underlaid it.

## Key takeaways

n line with the EECC's provisions, and the natural evolution of the provision of the US in the various countries, it appears that the New Electronic Communications Act directly and indirectly attaches less importance to the US.

At any rate, and subject to keeping, in broadly similar terms, the previous rules on the appointment of US providers and their financing, the New Electronic Communications Act updated its scope and purpose, removing certain services that have become obsolete or of little importance from the scope of the US. The most significant development in terms of the US relates, however, to a

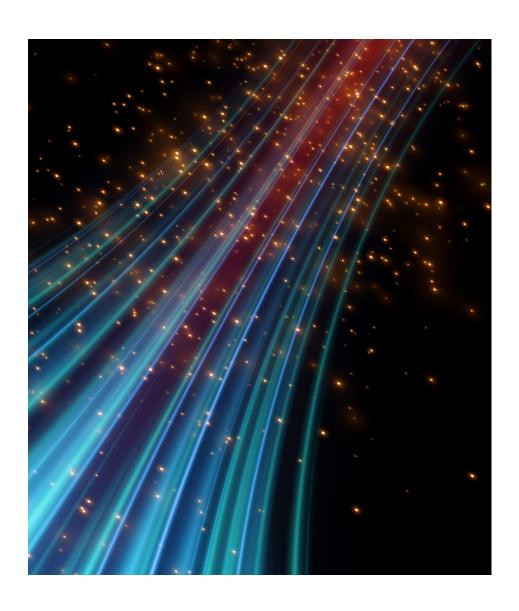
#### Footnotes:

1 - ANACOM determined the concept of excessive burden with the provision of broadband internet access service within the context of the internet social tariff, in its decision dated 27 September 2021. ANACOM considered that an excessive burden exists when the net cost arising from the provision of this service, verifiable and verified, is equal to or greater than 3% of the revenues earned with this provision or when the previous criterion is not fulfilled and the provider is able to demonstrate that its competitive capacity in the market has been affected materially. The following were considered for this purpose, among others: the evolution of profitability indicators and related metrics, market share, prices charged by the provider and

competitors, and the ratio of customers/accesses in IST to customers/accesses in the non-regulated market.

2 - Electronic mail; search engines, allowing the search and consultation of all kinds of information; online training and basic educational tools; online newspapers or news; buying or ordering goods or services online; job search and job search tools; professional networking; internet banking; using e-government services; using social networks and instant messaging; and calls and video calls (with standard quality).

3 - Under Ordinance 274-A/2021 of 29 November 2021, the price of the social tariff for fixed or mobile broadband internet access is 5 euros per month, plus VAT. Where the social tariff for fixed or mobile broadband internet access must be preceded by activation services and/or access equipment, the flat rate price to be charged for this purpose is 21.45 euros.



# **- 10 -**

What changes?

## New Electronic Communications Act

Small-Area Wireless Access Points and Radio Local Area Network Access

# Small-Area Wireless Access Points and Radio Local Area Network Access

Providing an overview of the general aspects of the framework for the roll-out and use of wireless network equipment, including access to radio local area networks, and the roll-out and operation of small-area wireless access points (addressed in Articles 25 and 50 of the New Electronic Communications Act, transposing Articles 56 and 57 EECC).

### How does the New Electronic Communications Act define smallarea wireless access points?

onsidering that this is a reality subject to a specific new framework, the New Electronic Communications Act defines smallarea wireless access point as "the low-power wireless network access equipment of a small size operating within a small range, using licensed radio spectrum or licence-exempt radio spectrum or a combination thereof, which may be used as part of a public electronic communications network, which may be equipped with one or more low visual impact antennae, and which allows wireless access by users to electronic communications networks regardless of the underlying network topology, be it mobile or fixed" (Article 3(1)(gg)). Can ANACOM or any other relevant

#### authorities subject the roll-out of small-area wireless access points to licensing, authorisation, or prior notification acts?

he new Act departs from its predecessor and lays down a special framework to streamline the roll-out of small-area wireless access points. Small-area wireless access points abiding by the physical and technical characteristics set forth in the European Commission's implementing acts cannot be subject to any licensing, authorisation, or prior notification acts (Article 25(1)). However, this simplified regime does not apply to roll-outs in buildings or places with protected architectural, historical or natural value, or for reasons of public safety, in accordance with the applicable legislation (Article 25(2)).

It should be noted that the above special framework only covers the time of roll-out of small-area wireless access points. The general framework continues to apply to what conflicts, for example, with the use of these access points. This does not therefore impair the application of (i) the key requirements set out in Decree-Law 57/2017 of 9 June 2017, which establishes the framework

for the provision to the market, commissioning and use of radio equipment; and (ii) the framework applicable to the use of radio spectrum, namely Chapter II of the New Electronic Communications Act, which regulates, among other things, the assignment of rights of use of frequencies and the obligations associated with their use (in this regard, we refer to the text on the Radio Spectrum Framework) (Article 25 (3)).

# Are any administrative costs payable for the roll-out of small-area wireless access points?

es. The roll-out of small-area wireless access points can be subject, where applicable, to administrative costs, without prejudice to any commercial agreements in place (Article 25(4)).

## How does the New Electronic Communications Act define the concept of radio local area network?

imilarly to small-area wireless access points, the New Electronic Communications
Act (basically in line with the EECC) defines radio local area network as "the low-power wireless access system, operating within a small range, with a low risk of interference with other such systems deployed in close proximity by other users, using, on a non-exclusive basis, harmonised

radio spectrum on the conditions applicable under the general authorisation" (Article 3(1)(nn)).

# What conditions apply to access to public electronic communications networks through radio local area networks?

he New Electronic
Communications Act establishes
that access to public electronic
communications networks can
be provided over radio local area
networks.

Harmonised radio spectrum can be used for this purpose, subject only to the conditions applicable under the general authorisation (in this respect, we refer to the texts on General Authorisation and Operator Rights and Obligations and Radio Spectrum) (Articles 36(1) and 27).

### Is it possible to provide access to public electronic communications networks via radio local area networks located at an end user's facilities?

Yes. In a new development, and in line with what is already happening in other markets, the New Electronic Communications Act allows operators to provide access to their networks through radio local area networks located at an end user's facilities. To do so, the operator will have to (i)

collect the end user's duly informed consent to the provision of such access; and (ii) comply with the applicable conditions in accordance with their general authorisation (Article 50(3)).

# What guarantees and rights do end users have regarding access to radio local area networks?

n line with Article 3(1) of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015, which establishes measures regarding access to the open internet, the New Electronic Communications Act imposes on ANACOM the obligation to ensure that operators do not unilaterally restrict or prevent end users from (i) accessing any radio local area networks of their choice, provided by third parties; and (ii) allowing access, reciprocally or otherwise, to public electronic communications networks by other end users, through radio local area networks, including on the basis of third party initiatives which aggregate and make publicly accessible the radio local area networks of different end users

End users additionally have the right to allow, reciprocally or otherwise, access to their radio local area networks by other end users, including through third-party initiatives which aggregate and make

publicly accessible the radio local area networks of different end users (Article 50(5)).

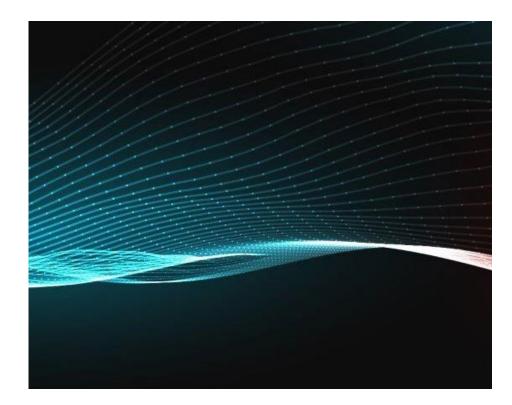
# How is the responsibility of the person granting access to the information conveyed over the radio local area network limited?

he New Electronic Communications Act applies the framework of the transmission service provider (intermediary) to the scenario where an entity grants access to the public network through a radio local area network (Article 14 of Decree-Law 7/2004, of 7 January 2004). To put it simply, anyone granting access to their network, who acts as a mere conveyor of information, is exempt from any liability for the information conveyed, provided that they are neither the source of it nor have any involvement with its content or recipients.

# Can ANACOM, or other relevant authorities, restrict the offer of radio local area networks to the public?

he New Electronic Communications Act specifically protects the provision of radio local area networks to the public by certain categories of entities. This provision cannot be unduly restricted when it is made (Article 50(7)):

a) By public bodies or in public



spaces close to facilities occupied by public bodies, where such provision is ancillary to the public services provided in those facilities; or b) At the initiative of non-

At the initiative of nongovernmental organisations or public bodies to aggregate and make reciprocally or generally accessible the radio local area networks of different end users, including, where applicable, those to which public access is offered in accordance with subparagraph (a).

This framework leaves several points open, namely (i) what is to be understood as an "undue restriction" and therefore prohibited by law; (ii) the terms under which ("due") restriction may occur; (iii) which public services are relevant for the purposes of

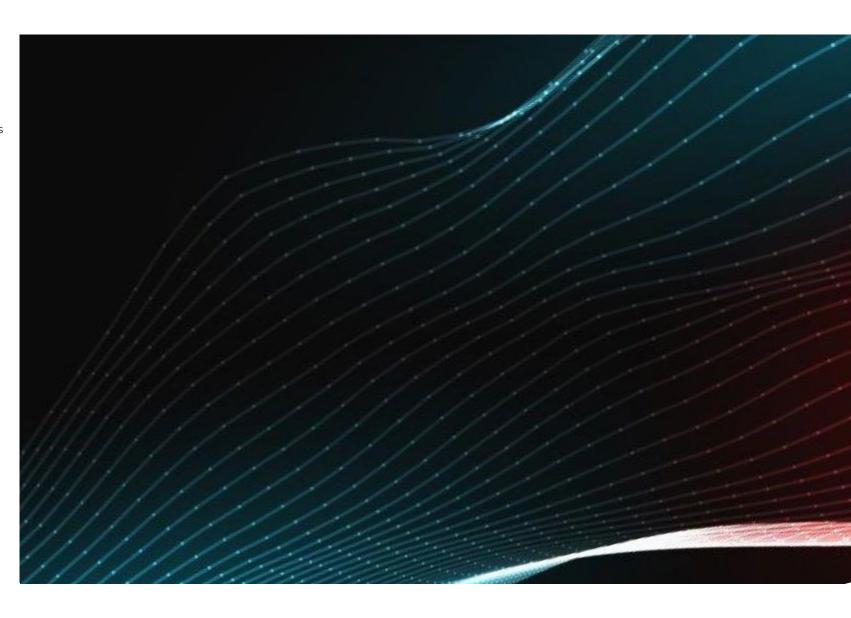
subparagraph (a) above; or (iv) under what terms may offers to the public of radio local area networks by entities that do not fulfil any of the above-mentioned subparagraphs be restricted.

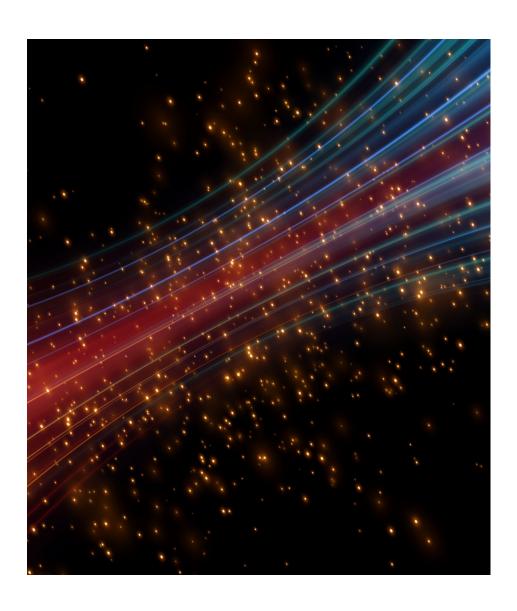
### Key takeaways

ware of the relevance of the rollout and broadcast of small-area wireless access points and radio local area networks for the development of communications, the legislator has established special rules applicable to these realities.

On this basis, the New Electronic Communications Act provides for a licensing exemption for the roll-out of small-area wireless access points, except in the case of buildings or sites with protected architectural, historical or natural value, or for reasons of public safety.

On the other hand, the possibility of radio local area networks allowing access to public electronic communications networks is expressly established, subject to the conditions applicable to the use of radio spectrum. The possibility that operators may allow public access to their networks through radio local area networks located at end user's facilities, subject to the end user's consent, merits to be highlighted.





# 11

What changes?

## New Electronic Communications Act

Administrative Offence Framework

## **Administrative Offence Framework**

Highlighting some of the main rules on administrative offences contained in the New Electronic Communications Act, as provided, in particular, in its Articles 178 et seq., as well as in the Framework Scheme of Administrative Offences in the Communications Sector ("Framework Scheme"), enacted by Law 99/2009, of 4 September 1999.

# What are the penalties applicable in respect of electronic communications?

he New Electronic
Communications Act
still provides for a set of
administrative offences, divided into
three levels of seriousness (light,
serious and very serious), punishable
according to their seriousness and the
dimension of the offender.

The Framework Scheme, which was also amended upon the enactment of Law 16/2002, of 16 August 2002, applies to the proceedings related to these offences.

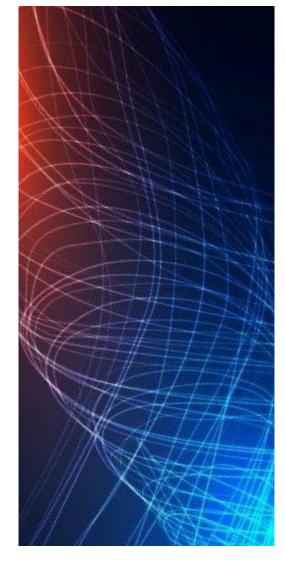
## What has the New Electronic Communications Act added to the list of existing administrative offences?

he penalties applicable for failure to comply with the obligations imposed on operators did not undergo any relevant changes with the New Electronic Communications Act, particularly regarding the classification of administrative offences according to their seriousness.

The most significant changes relate to offences that, as a result of the revision of the Act, no longer have a purpose (such as the obligations of the universal service provider with respect to public payphones or telephone directories). Consequently, their violation is no longer considered an administrative offence. The new obligations arising from the New Electronic Communications Act have, however, been associated to a type of administrative offence.

# What are the amounts of the administrative fines applicable in the event of an offence?

he New Electronic
Communications Act did not
change the amounts established



under its predecessor's framework. The administrative fines vary according to the level of seriousness of the offence and the dimension of the agent (individual, micro, small or medium-sized enterprise, or major enterprise).

Thus, depending on the seriousness of the offence, administrative fines can range, for major enterprises, between € 2,000 and € 100,000 (light offences), between € 1,000,000 (serious offences) and between € 20,000 and € 5,000,000 (very serious offences).

## What are the criteria to establish the dimension of the enterprise?

esides approving the New Electronic Communications Act, Law 16/2002, of 16 August 2002, also amended the Framework Scheme. New rules were defined to classify the dimension of offenders (Article 7(6)(a) of the Framework Scheme):

 a) Micro-enterprise (i) has fewer than 10 employees, (ii) has an annual turnover or total annual balance sheet not exceeding 2 million euros, and (iii) its share capital or voting rights are not directly or indirectly held by an enterprise or group of enterprises in any of the other categories;

- b) Small enterprise has (i) fewer than 50 employees, and (ii) an annual turnover or total annual balance sheet not exceeding 10 million euros. Also includes microenterprises that have 20% or more of their share capital or voting rights directly or indirectly held by a small enterprise or set of small enterprises;
- c) Medium-sized enterprise has (i) fewer than 250 employees, and (ii) an annual turnover not exceeding 50 million euros or a total annual balance sheet not exceeding 43 million euros. Also includes enterprises that may not meet these requirements, but which have 20% or more of their share capital or voting rights directly or indirectly held by a medium-sized enterprise or group of medium-sized enterprises;
- d) Major enterprise has (i) more than 250 employees, and (ii) an annual turnover exceeding 50 million euros or a total annual balance sheet exceeding 43 million euros. Also includes enterprises that, while meeting the economic requirements and the average number of employees foreseen for micro, small and medium-sized enterprises, have 20% or more of their share capital or voting rights directly or indirectly held by a major enterprise or set of major enterprises.

This classification is established based on the financial data of the year prior to the year of prosecution, without prejudice to the possibility of justifiably challenging the assigned classification by submitting new facts. If ANACOM is unable to determine the dimension of the offending enterprise, the administrative offence framework foreseen for medium-sized enterprises will apply, without prejudice to the possibility of subsequently providing proof of the true dimension of the enterprise (Article 7(10) of the Framework Scheme).

## Can penalties other than administrative fines apply?

he New Electronic
Communications Act also
provides that ancillary penalties
may be applied for certain types
of offences (Article 179 of the New
Electronic Communications Act),
with no changes from the previous
framework. Such ancillary penalties
may include:

- forfeiture of objects to the benefit of the State;
- ii) prohibition to engage in the business for up to 2 (two) years; and
- iii) debarment from comparative or competitive selection procedures for up to 2 (two) years.

# Can directors and officers be held liable for administrative offences committed by corporate persons?

ny natural person can be held liable for the administrative offences foreseen in the New Electronic Communications Act, provided that they participated in the commission of the offence, in which case they will be charged the administrative fines foreseen for natural persons. This possibility already existed in the previous Electronic Communications Act since individuals may exercise, when duly authorised, the activity of network provider and electronic communications service provider.

A distinct new issue is the possible liability of members of governing bodies and those who hold management positions, as well as those responsible for the management or supervision of the areas of activity of legal entities in which an administrative offence is committed, in cases where they were aware (or should have been aware) of the unlawful practice and failed to take appropriate measures to prevent or stop it (Article 3(4) of the Framework).

This is one of the most striking aspects, in terms of administrative offences, introduced by the new framework. The legislator is now thus allowed to foresee, in any statute containing a list of administrative offences in

the communications sector, the possibility of applying to members of governing bodies and those who hold management positions, as well as those responsible for the management or supervision of the areas of activity of the legal entity in which an administrative offence is committed, the fine applicable to the legal entity for the violation (by omission) of their duties, even if they did not directly take part in the commission of the offence.

### Does this framework already apply to the list of administrative offences set forth in the New Electronic Communications Act?

espite the introduction of the enabling provision in the Framework Scheme and the fact that this possibility was discussed during the preparatory work of the new framework, the legislator did not determine which offences under the New Electronic Communications Act members of the governing bodies and those who hold management positions, as well as those responsible for the management or supervision of the areas of activity of the legal entity in which an offence is committed, can be held liable for in these terms

This will require an amendment to the New Electronic Communications Act to establish which administrative offences can generate liability for members of



governing bodies and those who hold management positions, as well as for those responsible for the relevant areas of management or supervision.

The possibility of resorting to the warning procedure (Article 15 of the Framework Scheme) is introduced, regardless of the seriousness of the offence in question (not just for light offences), provided that the offence is remediable and has not resulted in significant injury, and it is clarified that the final decision is not a conviction.

The restriction on **summary proceedings** (Article 21 of the Framework Scheme) for light or serious administrative offences is also lifted, giving ANACOM the discretion to assess the seriousness and specific unlawfulness of the offence or the degree of guilt, and to decide whether to resort to this type of proceedings.

## When can the administrative fine be paid voluntarily?

he changes to Article 23(1) of the Framework Scheme restrict the situations in which voluntary payment of the administrative fine is admissible to minor offences and serious offences committed with negligence (it previously covered minor, serious and also very serious offences committed with negligence).

Voluntary payment entails the dismissal of the proceedings, but still counts as a conviction, for the purposes of verifying the requirements of a repeat offence.

## How are notices served in administrative offence proceedings?

he amendments to the Framework Scheme show an intention to dematerialise the administrative offence proceedings by extending the forms of notification, innovatively providing for the possibility of notification through (i) the Public Electronic Notification Service (SPNE) or an electronic service to be provided by ANACOM; and (ii) email, in addition to the traditional forms of notification. Notification by email is only valid with the express consent of the notified party. Express consent is defined as the use of email, in the context of the proceedings in question, either by the notified party itself or by its attorney, as a means of contacting ANACOM.

## Can appeals be filed against ANACOM's decisions?

he amendments to the Framework Scheme clarify that decisions, orders and other measures adopted by ANACOM in the context of administrative offence proceedings (and not only decisions imposing a fine) may be challenged before the Competition, Regulation and Supervision Court (Article 32(3) of the Framework Scheme). The appeal only has suspensive effect regarding decisions that determine the application of administrative fines or ancillary penalties or that concern

matters subject to court secrecy (Article 32/4 of the Framework Scheme).

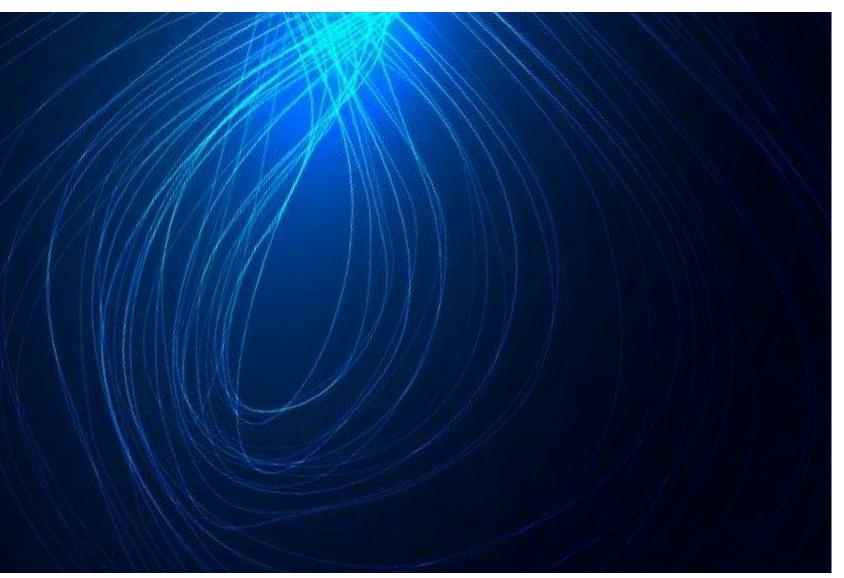
## Can ANACOM file appeals against court decisions and orders?

s a result of the legislative changes, ANACOM may now appeal against judgments and orders issued by the court, including on nullity and other preliminary or incidental matters or the application of interim measures (Article 32(8) of the Framework Scheme).

### **Key Takeaways**

he New Electronic Communications Act does not significantly change the existing penalty framework.

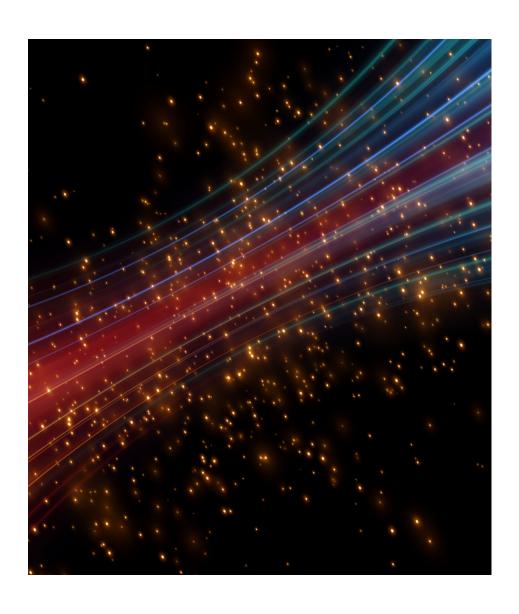
Breach of the duties set forth in the New Electronic Communications Act remains an administrative offence, and this breach is escalated, as is the corresponding penalty, according to the seriousness of the offence and the dimension of the offender. The criteria



for classifying enterprises have, however, been amended.

The Framework Scheme now foresees the possibility of creating, in specific regimes, a type of administrative offence concerning the violation of supervisory duties by members of governing bodies and those who hold management positions, as well as those responsible for the management or supervision of the areas of activity of the legal entity in which an administrative offence is committed. If such individuals know of the offence and fail to prevent or put an end to it, they may be subject to a fine as the legal entity to which the offence is attributed. No such type of offence has, however, been established in the New Electronic Communications Act for the time being.

Regarding forms of proceedings, ANACOM is now given greater freedom to apply special forms of proceedings to promote speedy resolution, but the possibility of voluntary payment of the administrative fine is restricted to light and serious offences committed with negligence.



# **- 12 -**

What changes?

## New Electronic Communications Act

Correlation Table of the New Electronic Communications Act

# Correlation Table of the New Electronic Communications Act

## **CORRELATION TABLE**

(Legislation Regarding Electronic Communications)

European Electronic Communications Code	Law 5/2004, of 10 February 2004
RT	
Article 1 (Subject matter, scope and aims)	Article 1 (Subject matter)
Article 1 (Subject matter, scope and aims)	Article 2 (Scope)
Article 2 (Definitions)	Article 3 (Definitions)
EGULATORY AND OTHER S AND REGULATORY PRIN	COMPETENT AUTHORITIES, CIPLES
Article 5 (National regulatory and other competent authorities) + Article 6 (Independence of national regulatory and other competent authorities) + Article 9 (Regulatory capacity of national regulatory authorities)	Article 4 (National Regulatory Authority)
Article 3 (General objectives)	Article 5 (Regulatory objectives)
Article 3(4) (General objectives)	Article 5 (Regulatory objectives)
Article 10 (Participation of national regulatory authorities in BEREC)	Article 6 (Consolidating the internal market)
	Article 1 (Subject matter, scope and aims)  Article 1 (Subject matter, scope and aims)  Article 2 (Definitions)  EGULATORY AND OTHER SAND REGULATORY PRIN  Article 5 (National regulatory and other competent authorities) +  Article 6 (Independence of national regulatory and other competent authorities) +  Article 9 (Regulatory capacity of national regulatory authorities)  Article 3 (General objectives)  Article 3(4) (General objectives)  Article 10 (Participation of national regulatory

Article 8 (Cooperation with national authorities)	Article 11 (Cooperation with national authorities)	Article 7 (Cooperation)
Article 9 (Other cooperation mechanisms)	Articles 24(2) and 24(3) (Consultation of interested parties)	Article 7 (Cooperation)
Article 10 (Public consultation procedure)	Article 23 (Consultation and transparency mech- anism) + Article 24 (Con- sultation of interested parties)	Article 8 (General consultation procedure)
Article 11 (Urgent Measures)	Article 27(4) (Resolution of cross-border disputes)	Article 9 (Urgent Measures)
Article 12 (Administrative dispute resolution between undertakings)	Article 26 (Dispute resolution between undertakings)	Article 10 (Administrative dispute resolution)
Article 13 (Refusal of the dispute resolution request)	Article 26(2) (Dispute resolution between undertakings)	Article 11 (Refusal of the dispute resolution request)
Article 14 (Administrative resolution of cross- border disputes)	Article 27 (Resolution of cross-border disputes)	Article 12 (Resolution of cross-border disputes)
Article 15 (Judicial review)	Article 31 (Right of appeal)	Article 13 (Judicial review)
TITLE III – GENERAL A	UTHORISATION, FREQUE	NCY, NUMBERS AND SECURI-
Chapter I (General Aut	horisation System)	
Article 16 (Provision of networks and services)	Article 12 (General authorisation of electronic communications networks and services)	Article 19 (Provision of networks and services)

(Legislation Regarding Electronic Communications)

Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 17 (Reporting obligations)	Articles 12(3) and 12(4) (General authorisation of electronic communications networks and services) + Article 14 (Declarations to facilitate the exercise of rights to install facilities and rights of interconnection)	Article 21 (Procedure)
Article 18 (Reporting obligations exemption)	There is no matching Article.	N/A
Article 19 (Registration of undertakings)	Article 12(4) (General authorisation of electronic communications networks and services)	Article 21-A (Registration of undertakings)
Article 20 (Rights)	Article 15 (Minimum list of rights derived from the general authorisation)	Article 22 (Rights of undertakings providing publicly available networks or services) + Article 23 (Rights of undertakings providing networks or services not available to the public)
Article 21 (Amendment of rights and obligations)	Article 18 (Amendment of rights and obligations)	Article 20 (Amendment of rights and obligations)
Article 22 (Restriction and withdrawal of rights of use)	Article 19 (Restriction or withdrawal of rights)	Article 33(5) (Term and renewal of rights of use for frequencies)
Article 23 (Rights of way)	Article 43 (Rights of way)	Article 24 (Rights of way)

Article 24 (Co- location and sharing)	Article 44 (Colocation and sharing of network elements and associated facilities for providers of electronic communications networks)	Article 25 (Co-location and facility sharing)
Article 25 (Deployment and operation of small- area wireless access points)	Article 57 (Deployment and operation of small- area wireless access points)	N/A
Article 26 (Infrastructures suitable for hosting electronic communications networks)	There is no matching Article.	Article 25-A (Installation of infrastructures suitable for hosting electronic communications networks)
Article 27 (General conditions)	Article 13 (Conditions attached to the general authorisation and to the rights of use for radio spectrum and for numbering resources, and specific obligations)	Article 27 (General conditions)
Article 28 (Specific conditions)	Article 13 (Conditions attached to the general authorisation and to the rights of use for radio spectrum and for numbering resources, and specific obligations)	Article 28 (Specific conditions)
Article 29 (Accounting separation and financial reports)	Article 17 (Accounting separation and financial reports)	Article 41 (Accounting separation and financial reports)

CORRELATION TABLE (Legislation Regarding Electronic Communications)		
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 30 (Standardisation)	Article 39 (Standardisation)	Article 29 (Standardisation)
Chapter II (Radio Spec	trum)	
Article 31 (Public domain)	Article 45(1) (Management of radio spectrum)	Article 14 (Radio spectrum public domain)
Article 32 (Management of radio spectrum)	Article 45 (Management of radio spectrum)	Article 15 (Frequencies)
Article 33 (Strategic planning and coordination of radio spectrum policy)	Article 4 (Strategic planning and coordination of radio spectrum policy)	Article 15 (Frequencies)
Article 34 (Technology and service neutrality in radio spectrum management)	Article 73(2)(c) (Obligations of access to, and use of, specific network elements and associated facilities)	Article 16-A (Technology and service neutrality in radio spectrum management)
Article 35 (National Frequency Allocation Plan)	There is no matching Article.	Article 16 (National Frequency Allocation Plan)
Article 36 (Use of radio spectrum)	Article 13 (Conditions attached to the general authorisation and to the rights of use for radio spectrum and for numbering resources, and specific obligations) + Article 46 (Authorisation of the use of radio spectrum)	Article 19(4) (Provision of networks and services) + Article 30 (Granting of rights of use for frequencies)

Article 37 (Granting of rights of use for radio spectrum)	Article 48 (Granting of individual rights of use for radio spectrum) + Article 55 (Procedure for limiting the number of rights of use to be granted for radio spectrum)	Article 30 (Granting of rights of use for frequencies)
Article 38 (Limiting the number of rights of use for radio spectrum)	Article 55 (Procedure for limiting the number of rights of use to be granted for radio spectrum)	Article 31 (Limiting the number of rights of use for frequencies)
Article 39 (Conditions attached to the rights of use for radio spectrum)	Article 13 (Conditions attached to the general authorisation and to the rights of use for radio spectrum and for numbering resources, and specific obligations) + Article 47 (Conditions attached to individual rights of use for radio spectrum)	Article 32 (Conditions attached to the rights of use for frequencies)
Article 40 (Duration of rights of use for radio spectrum)	Article 49 (Duration of rights)	Article 33(1) (Term and renewal of rights of use for frequencies)
Article 41 (Renewal of rights of use for radio spectrum)	Article 50 (Renewal of individual rights of use for harmonised radio spectrum)	Article 33(2) et seq. (Term and renewal of rights of use for frequencies)
Article 42 (Transfer or lease of rights of use for radio spectrum)	Article 51 (Transfer or lease of individual rights of use for radio spectrum)	Article 34 (Transfer and lease of rights of use for frequencies)
Article 43 (Joint authorisation process to grant rights of use for radio spectrum)	Article 37 (Joint authorisation process to grant individual rights of use for radio spectrum)	N/A

CORRELATION TABLE	Electronic Communication	s)
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 44 (Competition)	Article 52 (Competition)	Article 35 (Accumulation of rights of use for frequencies)
Article 45 (Coordinated timing of assignments)	Article 53 (Coordinated timing of assignments)	Article 15 (Frequencies)
Article 46 (Alternative use of the harmonised radio spectrum)	Article 45(3) (Management of radio spectrum)	N/A
Article 47 (Peer review procedure)	Article 35 (Peer review process)	N/A
Article 48 (Granting of rights of use for radio spectrum within common selection procedures)	Article 36 (Harmonised assignment of radio spectrum)	Article 30(10) (Granting of rights of use for frequencies)
Article 49 (Radio Spectrum Coordination among Member States)	Article 28 (Radio Spectrum Coordination among Member States)	Article 16 (National Frequency Allocation Plan)
Article 50 (Access to radio local area networks)	Article 56 (Access to radio local area networks)	N/A
Chapter III (Numbering Resources)		
Article 51 (Numbering resources)	Article 93 (Numbering resources)	Article 17 (Numbering)
Article 52 (Harmonised numbers for services of social value)	Article 96 (Missing children and child helpline hotlines)	Article 44-A (Harmonised numbers for services of social value)

Article 53 (Access to numbers and services)	Article 97 (Access to numbers and services)	Article 44 (European telephone access codes)
Article 54 (Granting of rights of use for numbering resources)	Article 93 (Numbering resources) + Article 94 (Procedure for granting of rights of use for numbering resources)	Article 36 (Granting of rights of use for numbers)
Article 55 (Extraterritorial use of numbering resources)	Article 93(4) (Numbering resources)	Article 44 (European telephone access codes)
Article 56 (Conditions attached to the rights of use for numbering resources)	Annex I, Part E	Article 37 (Conditions attached to the rights of use for numbers)
Article 57 (Granting numbering resources to undertakings other than providers of electronic communications networks or services)	Article 93(2) (Numbering resources)	Article 36 (Granting of rights of use for numbers)
Chapter IV (Security ar	nd Emergency)	
Article 58 (Security and emergency)	N/A	Article 2-A (Security and emergency)
Article 59 (Security of networks and services)	Articles 40(1) and 40(4) (Security of networks and services)	Article 2-A (Security and emergency) and Articles 54-A(1) and 54-A(3) (Obligations of undertakings regarding security and integrity)
Article 60 (Security incidents)	Articles 40(2), 40(3) and 40(4) (Security of networks and services)	Article 54-A(2) (Obligations of undertakings regarding security and integrity) + Article 54-E (Reporting obligations of the NRA)

## (Legislation Regarding Electronic Communications)

Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 61 (Implementing measures)	Article 41(1) (Implementation and enforcement)	Article 54-C (Implementing measures)
Article 62 (Additional requirements)	There is no matching Article.	Article 54-D (Additional requirements)
Article 63 (Audits, inspections, and provision of information)	Article 41(2) (Implementation and enforcement)	Article 54-F (Audits and provision of information)
Article 64 (Binding instructions and investigation)	Article 41(1) (Implementation and enforcement)	Article 54-G (Binding instructions and investigation)
Article 65 (Assistance and cooperation)	Articles 41(4) and 41(5) (Implementation and enforcement)	N/A
Article 66 (Availability of services)	Article 108 (Availability of services)	Article 49 (Availability of services)
Article 67 (Emergency communications and the single European emergency number)	Article 109 (Emergency communications and the single European emergency number)	Article 51 (Emergency services and single European emergency call number)
Article 68 (Transmission of public warnings)	Article 110 (Public warning system)	N/A

## TITLE IV - MARKET ANALYSIS AND REGULATORY CONTROL

## **Chapter I (General Provisions)**

Article 69 (General	N/A	Article 55 (Scope and general
principles)		principles)

Article 70 (Powers of the national regulatory authority)	Article 61 (Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection)	Article 56 (Competence)
Chapter II (Procedure f	or consolidating the interna	al market)
Article 71 (Procedure for consolidating the internal market)	Article 32 (Consolidating the internal market for electronic communications)	Article 6 (Consolidating the Internal Market) and Article 57 (Specific consultation procedure)
Article 72 (Procedure for consolidating the internal market as part of the imposition of specific obligations)	Article 33 (Procedure for the consistent application of remedies)	Article 57-A (Procedure for the consistent application of regulatory obligations)
Chapter III (Market Ana	alvsis)	
•	, 0.0,	
Article 73 (Definition of markets)	Article 64(3) (Procedure for the identification and definition of markets)	Article 58 (Definition of markets)
Article 73 (Definition	Article 64(3) (Procedure for the identification and	
Article 73 (Definition of markets)  Article 74 (Analysis of the relevant markets	Article 64(3) (Procedure for the identification and definition of markets) Articles 67(1), 67(2) and 67(3) (Market analysis	markets) Articles 59(1), 59(2), 59(3) and
Article 73 (Definition of markets)  Article 74 (Analysis of the relevant markets features)  Article 75 (Market	Article 64(3) (Procedure for the identification and definition of markets)  Articles 67(1), 67(2) and 67(3) (Market analysis procedure)  Articles 67(4), 67(5) and 67(6) (Market analysis	markets)  Articles 59(1), 59(2), 59(3) and 59(4) (Market analysis)  Article 59-A (Market analysis

<b>CORRELATION TABLE</b>		
(Legislation Regarding Electronic Communications)		
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 78 (Significant market power)	Article 63 (Undertakings with significant market power)	Article 60 (Significant market power)
Article 79 (Cooperation with the Competition Authority)	Article 67(1) (Market analysis procedure)	Article 61 (Cooperation with the Competition Authority)
Chapter IV (Access and	Interconnection)	
Article 80 (Freedom of negotiation)	Article 59 (General framework for access and interconnection)	Article 62 (Freedom of negotiation)
Article 81 (Competences of the national regulatory authority)	Article 61 (Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection)	Article 63 (Competences of the NRA)
Article 82 (Access and interconnection conditions)	Article 60(1) (Rights and obligations of undertakings)	Article 64 (Access and interconnection conditions)
Article 83 (Confidentiality)	Article 60(2) (Rights and obligations of undertakings)	Article 65 (Confidentiality)
Article 84 (Imposition, maintenance, amendment, or withdrawal of obligations)	Article 68 (Imposition, amendment, or withdrawal of obligations)	Article 66 (Imposition, maintenance, amendment, or withdrawal of obligations)

Article 85 (Obligation of transparency)	Articles 69(1) and 69(3) (Obligation of transparency)	Article 67 (Obligation of transparency)
Article 86 (Reference offers)	Articles 69(2) and 69(4) (Obligation of transparency)	Article 68 (Reference offers) and Article 69 (Minimum elements to be included in reference offers)
Article 87 (Obligation of non-discrimination)	Article 70 (Obligations of non-discrimination)	Article 70 (Obligation of non-discrimination)
Article 88 (Obligation of accounting separation)	Article 71 (Obligation of accounting separation)	Article 71 (Obligation of accounting separation)
Article 89 (Access to infrastructures)	Article 72 (Access to civil engineering)	Article 22 (Rights of undertakings providing publicly available networks or services), Article 27 (General Conditions) and Article 64 (Access and interconnection conditions)
Article 90 (Obligations of access to, and use of, specific network elements and associated facilities)	Articles 73(1) and 73(2) (Obligations of access to, and use of, specific network elements and associated facilities)	Article 72 (Obligations of access to, and use of, specific network facilities)
Article 91 (Technical and operational conditions)	Article 73(3) (Obligations of access to, and use of, specific network elements and associated facilities)	Article 73 (Technical and operational conditions)
Article 92 (Price control and cost accounting obligations)	Articles 74(1) and 74(2) (Price control and cost accounting obligations)	Article 74 (Price control and cost accounting obligation)

## (Legislation Regarding Electronic Communications)

Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 93 (Demonstration of cost orientation of prices)	Article 74(3) (Price control and cost accounting obligations)	Article 75 (Demonstration of cost orientation of prices)
Article 94 (Verification of cost accounting systems)	Article 74(4) (Price control and cost accounting obligations)	Article 76 (Verification of cost accounting systems)
Article 95 (Termination prices)	Article 75 (Termination rates)	N/A
Article 96 (Regulatory treatment of new very high-capacity network elements)	Article 76 (Regulatory treatment of new very high-capacity network elements)	N/A
Article 97 (Criteria for assessing co-investment offers)	Annex IV (Criteria for assessing co-investment offers)	N/A
Article 98 (Functional separation)	Article 77 (Functional separation)	Article 76-A (Functional separation obligation)
Article 99 (Voluntary functional separation)	Article 78 (Voluntary separation by a vertically integrated undertaking)	Article 76-B (Voluntary functional separation)
Article 100 (Commitments procedure)	Article 79 (Commitments procedure)	N/A
Article 101 (Wholesale-only undertakings)	Article 80 (Wholesale- only undertakings)	N/A
Article 102 (Migration from legacy infrastructure)	Article 81 (Migration from legacy infrastructure)	N/A

Article 103 (Imposition of access and interconnection obligations)	Article 61(2) (Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection)	Article 77 (Imposition of access and interconnection obligations)
Article 104 (Obligation of access to cables up to the first distribution point)	Article 61(3) (Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection)	N/A
Article 105 (Localised roaming obligations)	Article 61(4) (Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection)	N/A
Article 106 (Conditional access)	Article 62(1) (Conditional access systems and other facilities) + Annex II, Part I, point (a) (Conditions for access to digital television and radio services broadcast to viewers and listeners in the Union)	N/A
Article 107 (Industrial property rights)	Annex II, Part I, point (b) (Conditions for access to digital television and radio services broadcast to viewers and listeners in the Union)	Article 80 (Industrial property rights)

## (Legislation Regarding Electronic Communications)

		•
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 108 (Amendment or withdrawal of conditional access obligations)	Article 62(2) (Conditional access systems and other facilities)	Article 81 (Amendment or withdrawal of conditional access obligations)
Chapter V (Regulatory	/ control in retail markets)	
Article 109 (Control in	Article 83 (Regulatory	Article 85 (Control in retail

## TITLE V – USERS' RIGHTS, UNIVERSAL SERVICE AND ADDITIONAL MANDATORY SERVICES

## Chapter I (End-user Rights)

Article 110 (Scope of this chapter) <sup>1</sup>	Article 98 (Exemption of certain microenterprises)	N/A
Article 111 (Non-discrimination)	Article 99 (Non- discrimination)	Article 39 (Protection of users and subscribers)
Article 112 (Fundamental rights safeguard)	Article 100 (Fundamental rights safeguard)	N/A
Article 113 (End-user protection)	Article 101(1) (Level of harmonisation)	Articles 39(1), 39(2), 39(3), 39(4) and 39(5) (Protection of users and subscribers)

 $<sup>1 \</sup>quad \text{Chapter I ("End-user rights") does not apply to microenterprises, with the exceptions set out in Articles 110 and 111.}$ 

icle 107 (Bundled ers)	There is no matching Article.
icle 111 (Equivalent ess and choice end-users with abilities)	Article 39(6) (Protection of users and subscribers)
icle 103(1) Insparency, Inparison of offers I publication of Inmation)	Articles 47(1), 47(2), 47(3) and 47(4) (Obligation to publish information)
icle 104 (Quality service related nternet access vices and publicly ilable interpersonal nmunications services)	Article 40 (Quality of service)
icles 103(2) and 3(3) (Transparency, nparison of offers I publication of ormation)	Articles 47(4) and 47(5) (Obligation to publish information)
icle 103(4) Insparency, Inparison of offers I publication of Inmation)	Article 47-A(4) (Obligation to provide information to subscribers)
icle 102 (Information uirements for ıtracts)	Articles 48(1), 48(2), 48(3) and 48(4) (Contracts)
	cle 111 (Equivalent ess and choice end-users with abilities) cle 103(1) Insparency, Inparison of offers I publication of ormation) cle 104 (Quality ervice related enternet access vices and publicly illable interpersonal enmunications services) cles 103(2) and (3) (Transparency, enparison of offers I publication of ormation) cle 103(4) Insparency, Inparison of offers I publication of offers

<sup>2</sup> During the parliamentary debate on the new ECL, the Direção-Geral do Consumidor [Portuguese Directorate-General for Consumer Protection] ("DGC") warned that paragraph 9 would not be applicable a priori to distance and off-premises contracts.

**- 12 —** 

(Legislation Regarding Electronic Communications		
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 122 (Billing)	Annex VI (Description of facilities and services referred to in Article 88 (Control of expenditure), Article 115 (Additional facilities) and Article 106 (Provider switching and number portability)), Part A (Facilities and services referred to in Articles 88 and 115), point (a)	Article 39(3)(c) (Protection of users and subscribers) and Article 94 (Control of expenditure)
Article 123 (Usage control mechanisms)	Article 102(5) (Information requirements for contracts)	There is no matching Article.
Article 124 (Selective communications barring)	Annex VI (Description of facilities and services referred to in Article 88 (Control of expenditure), Article 115 (Additional facilities) and Article 106 (Provider switching and number portability)), Part A (Facilities and services referred to in Articles 88 and 115), point (b)	Article 45 (Selective communications barring)

of goods or services from third parties)	Annex VI (Description of facilities and services referred to in Article 88 (Control of expenditure), Article 115 (Additional facilities) and Article 106 (Provider switching and number portability)), Part A (Facilities and services referred to in Articles 88 and 115), point (h)	There is no matching Article.
	There is no matching Article.	Article 46 (Procurement prevention mechanisms)
(Suspension and termination of the service provided to non-consumer end- users)	Annex VI (Description of facilities and services referred to in Article 88 (Control of expenditure), Article 115 (Additional facilities) and Article 106 (Provider switching and number portability)), Part A (Facilities and services referred to in Articles 88 and 115), point (e)	Article 52 (Suspension and termination of the service provided to non-consumer subscribers)
Article 128 (Suspension and termination of the service provided to consumers)	N/A	Article 52-A (Suspension and termination of the service provided to consumer subscribers)

<sup>3</sup> The Autoridade Nacional de Comunicações [Portuguese National Communications Authority] ("ANACOM") considers that the suspension of the service will also not take place "in cases where the consumer has made payment or has entered into any written payment agreement with the undertaking for the purpose of settling the amounts owed", provided that, as in the case of complaints, "the payment is made or the agreement is entered into before the date on which the suspension is due to begin".

# · 12 —

## CORRELATION TABLE (Legislation Regarding Electronic Communications)

Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 130 (Breach of performance service levels)	Article 105(5) (Contract duration and termination)	There is no matching Article.
Article 131 (Contract duration)	Articles 105(1), 105(2) and 105(7) (Contract duration and termination)	Article 48(8) (Contracts)
Article 132 (Automatic extension of contracts)	Article 105(3) (Contract duration and termination)	There is no matching Article.
Article 133 (Changes regarding the contract holder)	N/A	Article 48(4) (Contracts)
Article 134 (Change in circumstances)	N/A	N/A
Article 135 (Changes in the contractual conditions proposed by the provider of the services)	Article 105(4) (Contract duration and termination)	Articles 48(16) and 48(17) (Contracts)
Article 136 (Termination of the contract at the initiative of the consumer)	Articles 105(1), 105(2) and 105(7) (Contract duration and termination)	Articles 48(7), 48(10), 48(11), 48(12) and 48(13) (Contracts)
Article 137' (Suspension and expiration of contracts)	N/A	Article 52-A (Suspension and termination of the (service provided to consumer subscribers)

Article 138 (Termination of contracts at the initiative of the end- user)	Article 105(6) (Contract duration and termination)	Articles 48(4) and 48(7) (Contracts)
Article 139 (Unlocking of terminal equipment)	N/A	N/A <sup>4</sup>
Article 140 (Change of undertaking providing Internet access services)	Articles 106(1) and 106(6) (Provider switching and number portability)	N/A
Article 141 (Number portability)	Articles 106(2), 106(3), 106(4), 106(5) and 106(6) (Provider switching and number portability)	Article 54 (Number portability)
Article 142 (Competences of the national regulatory authority)	Articles 106(6), 106(7) and 106(8) (Provider switching and number portability)	Articles 54(5) and 54(7) (Number portability)
Article 143 (End-user complaints)	N/A	Article 48-A (End-user complaints)
Article 144 (Out- of-court dispute resolution)	Article 25 (Out-of-court dispute resolution)	Article 48-B (Out-of-court dispute resolution)
Article 145 (Directory enquiry services)	Article 112 (Directory enquiry services)	Article 50 (Directory enquiry services)
Article 146 (Provision of additional facilities)	Article 115 (Provision of additional facilities)	Article 53 (Provision of additional facilities)

<sup>4</sup> Subject to the regime of Decree-Law 56/2010, of 1 June 2010.

CORRELATION TABLE			
(Legislation Regarding Electronic Communications)			
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004	
Chapter II - Universal S	Service		
Article 147 (Concept)	Articles 84(1) and 84(2) (Affordable universal service)	Article 86 (Concept)	
Article 148 (Scope)	Articles 84(1) and 84(2) (Affordable universal service) + Article 85(4) (Provision of affordable universal service)	Article 87 (Scope of the universal service)	
Article 149 (Broadband internet)	Article 84(3) (Affordable universal service)	N/A	
Article 150 (Availability of universal service)	Articles 86(1) and 86(2) (Availability of universal service)	N/A	
Article 151 (Provision of affordable universal service)	Articles 85(1) and 85(2) (Provision of affordable universal service) + Article 88(2) (Control of expenditure)	Article 93 (Price regime)	
Article 152 (Supply Conditions)	Article 85(3) (Provision of affordable universal service) + Article 88(1) (Control of expenditure)	Articles 93(4) and 93(5) (Price Regime) + Article 94(6) (Control of expenditure)	
Article 153 (Support for the acquisition of services)	N/A	N/A	
Article 154 (Specific measures for citizens with disabilities)	Article 85(4) (Provision of affordable universal service)	Article 91 (Specific measures for users with disabilities)	

Article 155 (Control of expenditure)	Article 88(2) (Control of expenditure) + Annex VI (Description of facilities and services referred to in Article 88 (Control of expenditure), Article 115 (Additional facilities) and Article 106 (Provider switching and number portability)), Part A	Articles 94(1), 94(2), 94(3), 94(4) and 94(5) (Control of expenditure)
Article 156 (Quality of service)	Article 104 (Quality of service related to internet access services and publicly available interpersonal communications services)	Article 92 (Quality of service)
Article 157 (Compensation for the provision of universal service)	Article 89 (Cost of universal service obligations) + Annex VII (Calculating the net cost, if any, of universal service obligations and establishing any compensation or sharing mechanism in accordance with Articles 89 and 90), Part B (Compensation of net costs of universal service obligations)	Article 95 (Compensation of net cost)
Article 158 (Calculation of net cost)	Annex VII (Calculating the net cost, if any, of universal service obligations and establishing any compensation or sharing mechanism in accordance with Articles 89 and 90), Part A (Calculation of net cost)	Article 96 (Compensation of net cost)

## (Legislation Regarding Electronic Communications)

Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 159 (Financing mechanisms)	Article 90 (Financing of universal service obligations)	Article 97 (Financing)
Article 160 (Report)	Article 91(2) (Transparency)	Article 98 (Report)
Article 161 (Designation procedures)	Articles 86(3), 86(4) and 86(5) (Availability of universal service)	Article 99 (Universal service providers)
Article 162 (Additional mandatory services)	Article 92 (Additional mandatory services)	Article 100 (Additional mandatory services)

## TITLE VI - 'MUST CARRY' OBLIGATIONS, EQUIPMENT, AND ILLICIT DEVICES

Article 163 ('Must carry' obligations)	Article 114 ('Must carry' obligations)	Article 43 ('Must carry' obligations)
Article 164 (Interoperability of consumer digital television equipment)	Article 113 (Interoperability of car radio and consumer radio receivers and consumer digital television equipment)	Article 103 (Interoperability of consumer digital television equipment)
Article 165 (Interoperability of car radio)	Article 113 (Interoperability of car radio and consumer radio receivers and consumer digital television equipment)	N/A

Article 166 (Illicit	N/A	Article 104 (Illicit devices)
devices)		

## TITLE VII – FEES, SUPERVISION AND SURVEILLANCE

Chapter I (Fees)	

Article 167 (Annual Fee)	N/A	Articles 105(1)(b), 105(2), 105(4) and 105(5) (Fees)
Article 168 (Fees due for use of radio spectrum and numbering resources)	Article 42 (Fees for rights of use for radio spectrum and rights to install facilities)	Article 105 (Fees)
Article 169 (Fees for granting rights of way)	Article 42(1) (Fees for rights of use for radio spectrum and rights to install facilities)	Article 106 (Fees for rights of way)

## Chapter II (Supervision and Surveillance)

	(5.5)	,	
С	Article 170 (Provision of information by Indertakings)	Article 20(1) (Information request to undertakings)	Articles 108(1), 108(2), 108(3), 108(4) and 108(5) (Provision of information)
С	Article 171 (Provision of specific nformation)	Article 21 (Information required with regard to the general authorisation, rights of use and specific obligations)	Article 108 (Provision of information) and Article 109 (Purposes of the information request)
c b	Article 172 (Provision of information by the NRA and other competent outhorities)	Articles 20(2), 20(3), 20(4) and 20(5) (Information request to undertakings)	Articles 108(6), 108(7) and 108(8) (Provision of information)

# -12 -

CORRELATION TABLE		
(Legislation Regarding Electronic Communications)		
Law 16/2022, of 16 August 2022	European Electronic Communications Code	Law 5/2004, of 10 February 2004
Article 173 (Geographical survey of network deployments)	Article 22(1) (Geographical surveys of network deployments)	N/A
Article 174 (Designation of geographical areas without very high-capacity networks)	Articles 22(2), 22(3) and 22(4) (Geographical surveys of network deployments)	N/A
Article 175 (Use of the results of the geographical survey)	Article 22(5) (Geographical surveys of network deployments)	N/A
Article 176 (Disclosure of information from the geographical survey)	Articles 22(5) and 22(6) (Geographical surveys of network deployments)	N/A
Article 177 (Surveillance)	N/A	Article 112 (Surveillance)
Article 178 (Administrative offenses and fines)	Article 29 (Penalties)	Article 113 (Administrative offenses and fines)
Article 179 (Ancillary penalties)	Article 29 (Penalties)	Article 114 (Ancillary penalties)
Article 180 (Procedure and application)	N/A	Article 115 (Procedure and application)

ompliance)
measures)
c penalty
ority)
(2) and of
lication of

# **– 12 –**

## **CORRELATION TABLE**

(Legislation Regarding Electronic Communications)

Law 16/2022, of 16	European Electronic	Law 5/2004, of 10 February
August 2022	Communications Code	2004

## TITLE VIII - FINAL PROVISIONS

N/A	Article 126 (Calculation of time-limits)
Article 50(1) (Renewal of individual rights of use for harmonised radio spectrum) + Article 59(2) (General framework for access and interconnection)	Article 122 (Maintenance of rights and obligations)
N/A	N/A
	Article 50(1) (Renewal of individual rights of use for harmonised radio spectrum) + Article 59(2) (General framework for access and interconnection)

## What changes?

## New Electronic Communications Act

## **Contacts**



Magda Cocco mpc@vda.pt Head of Practice Partner Information, Communication & Technology, Head of Practice Partner Digital Frontiers



Tiago Bessa tcb@vda.pt Partner Information, Communication & Technology, Partner IP Transactions



## www.vda.pt

