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## The new Portuguese electronic communications law has been approved and a new wave of regulation has just began

**Portugal** | August 16 2022

After a long period of stagnation and delay in the transposition procedure – which should have been completed by 21 December 2020 and which led the European Commission, on 6 April 2022, to refer Portugal to the Court of Justice of the European Union – the European Electronic Communications Code (the “EECC”), was finally transposed into national law.

Law 16/2022, of 16 August, approving the new electronic communications law (the “New ECL”), was published in the Official Gazette and sets forth a new, modernized and forward-looking regulatory framework, with which every stakeholder, operator and end-user should be acquainted.

Overall, the New ECL introduces a comprehensive, complex and detailed set of rules closely following EECC's wording and objectives. In fact, when compared with the EECC's text, the topic where we can see more variations is the end-user's rights, something not surprising, since this matter was the epicentre of the Parliamentary discussions held during the legislative procedure.

Still, in comparison to the current regulatory framework, the New ECL introduces some significant changes, such as:

- **A new, broader definition for "electronic communications services", covering, among others, Over the Top (“OTT”) services.** This definition, essential to the New ECL's scope, covers not only the traditional services consisting wholly or mainly in the conveyance of signals, but also (i) internet access services, as defined in article 2 of Regulation (EU) 2015/2120 as well as (ii) interpersonal communications services, both number-based and number-independent.

Although encompassed by the New ECL's scope, OTT services are subject to a lighter, slightly different regime when compared to the "classic" electronic communication services. For instance, (i) their provision may not depend on the general authorisation regime (to the extent that they are number-independent services) and (ii) they are not subject to the general conditions applying to the provision of electronic communications services and may only be subject to access and interconnection obligations in justified cases.

- **Deployment and operation of small-area wireless access points.** The deployment and operation of small-area wireless access points (if compliant with the physical and technical characteristics set out in implementing acts of the European Commission) should be exempt from any licensing, authorisation or

prior notification to ANACOM (the Portuguese regulatory authority), save when deployed on buildings or sites of architectural, historical or natural protected values or for public safety reasons.

- **ANACOM's broader powers concerning spectrum management.** In the context of EECC's concerns over the impact of spectrum usage in competition, the New ECL strengthens ANACOM's powers in a plethora of different ways:
  - Shared use of radio spectrum. A significant innovation is the promotion of radio spectrum sharing (including passive or active infrastructures and roaming obligations), which may be determined by ANACOM or agreed between the operators themselves, within the limits of competition law, to ensure an effective and efficient use of spectrum.
  - Simultaneous expiry of rights of use of frequencies. The New ECL expressly grants ANACOM the power to adjust (apparently, either by extension or reduction) the duration of rights of use in one or more frequency bands to ensure their simultaneous expiry. This topic is particularly interesting, especially for future spectrum auctions or contests.
  - Transmission and spectrum hoarding control. Under the New ECL, ANACOM may determine the amendment of rights of use of frequencies whenever necessary to correct a distortion of competition caused by the transmission or hoarding of rights of use of spectrum, in justified cases and within the limits of the principle of proportionality, aiming at promoting effective competition in the internal market.
- **However, in the wake of the 5G auction, ANACOM's also lost some powers and prominence.** In fact, all regulations concerning the attribution of rights of use must now be approved by the Government. In addition, following the possibility granted by the EECC, the New ECL provides for the intervention of other competent authorities in the regulation of the sector, notably regarding end-user's rights.
- **A set of specific, asymmetric obligations applicable to undertakings with market power were reinforced,** namely: (i) obligations to meet reasonable requests for access to, and use of, civil engineering; (ii) obligations relating to the provision of commitments to co-invest in new very high capacity network elements, and (iii) obligations relating to functional and voluntary separation of a vertically integrated undertaking.

Out of this set, the main innovations relate to the regulation of very high capacity networks. The promotion of investment and the attainment of the EU digital goals led to the creation of a more friendly, flexible and *ad hoc* regulation model, allowing undertakings to propose regulatory remedies in order to avoid heterogeneous regulation (something very similar to competition regulation in merger cases). The text in the New ECL follows very closely the wording and logic of the EECC.

Also important to mention, the new light-touch regulatory regime applicable to wholesale-only companies, preventing the application of more stringent remedies (such as cost-orientation rules) as well as the possibility given to ANACOM to impose access to infrastructures irrespective of being part of the relevant market. This is something that ANACOM has applied in previous market analysis but is now expressly permitted. It is also an obligation that should be considered before imposing other remedies.

- **New specific, symmetric obligations applicable to any undertaking** such as (i) access obligations to wiring, cables and related resources up to the first concentration or distribution point, or, under certain scenarios, beyond it, and (ii) localised roaming access.

Symmetric obligations gained a specific boost in the New ECL, expanding to OTT operators and, in fact, to any entity owning wiring or ancillary resources. In the latter case, the obligations imposed may include rules on cost allocation. As in other topics, the application of these rules will greatly benefit from the guidance given by BEREC.

- **Geographical surveys of network deployments, including very high capacity networks.** These surveys should include information regarding the current geographic reach of broadband networks, as well as a forecast of the reach of broadband networks, including very high capacity networks, within the Portuguese territory. The gathered data should be considered by ANACOM and other competent authorities in the pursuit of their regulatory objectives and exercise of their powers, such as the definition of coverage obligations to be associated with rights of use of frequencies. ANACOM should carry out the first geographical survey by 21 December 2023 and a future tender to cover the so-called “white areas” is expected until the end of 2022.
- **End-users benefit most from the approval of the New ECL.** Indeed, the New ECL densified some of EECC's provisions on end-user and consumer protection topics, such as:
  - Ensuring that end-users are well informed of the set-up costs and quality of the electronic communication services being provided;
  - Safeguarding that end-users have a comparison tool allowing them to relate prices and other conditions between different electronic communication services and, when applicable, OTT services;
  - Granting consumers protection in case of service unavailability, notably in terms of price claims or reductions. In addition, in case of non-compliance with SLAs, the New ECL expressly establishes that consumers may now terminate the contract without penalties;
  - Strengthening consumer protection concerning minimum contractual commitment period. For instance, operators are obliged to make available service options comprising no minimum commitment period. In case operators offer any solutions with minimum commitment periods (with a maximum of 24 months), they are obliged to associate them with benefits linked to promotional conditions for terminal equipment, service installation or service activation. In addition, the New ECL regulates the compensation that operators can claim when consumers do not comply with minimum commitments;
  - Defining situations where the operators cannot claim compensation for the violation of the minimum contractual commitment period, notably in case of change of address; unemployment situation or incapacity for work;
  - Regulating specific rules for bundles as well as for WAP billing (a mechanism for consumers to buy content from Wireless Application Protocol (WAP) sites that is charged directly to their mobile phone bill).
- **Although the New ECL brings new and important rules on universal service,** social regulation in Portugal is now mainly conducted through the Internet social tariff, approved by Decree-Law no. 66/2021, of 30 July 2021. As such, it is not clear how the new rules on universal service can contribute to better achieve social regulation objectives.

The New ECL will enter into force 90 days after its publication, *i.e.*, on 14 November 2022, but some of its provisions regarding safety and integrity of networks enter into force immediately, *i.e.*, on 17 August 2022. In addition, the New ECL will generally apply to contracts concluded after it enters into force. However, some provisions, notably regarding minimum contractual commitments, will also apply to contracts previously concluded. The regime set forth by the New ECL is complex and does not lead to stable and clear conclusions, quite the opposite.

Although introducing major changes into the regulatory framework, some features of the New ECL remain questionable, such as:

- The law's applicability to contracts already in force between operators and end-users;
- The law's applicability to rights of use of frequencies previously issued, such as those attributed within the 5G auction;
- The articulation and interaction between the simplified regime for the deployment and operation of small-area wireless access points with the laws governing the installation of radiocommunications stations and networks (*i.e.*, Decree-Law no. 57/2017, of 9 June 2017 and Decree-Law no. 151-A/2000, of 20 June 2000);
- The shared use of radio spectrum regime is not clear and transparent;
- The complexities and intricacies of the regulation of very high capacity networks, with the admission of a somehow "regulation by request";
- The application of remedies to wholesale-only companies;
- The regulatory framework applicable to operators providing non-public or private networks or services; and
- The enforcement of symmetric regulatory obligations to non-operators and the imposition of access to civil infrastructures.

All stakeholders, not only operators but also end-users, should keep a close watch on the changes introduced by the New ECL and be prepared to adapt their activities accordingly. It will also be important to keep track on how ANACOM and other competent authorities will enforce this new Act.

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