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TMT 2021

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Portugal

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Trends and Developments

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SRS Advogados is a full-service, multi-practice law firm advising clients on all aspects of national and international law. The firm's lawyers are focused on its clients' business and have acquired knowledge and experience by advising large national and international corporate groups and financial institutions over the last 28 years. Through the creation of SRS Global (Angola, Brazil, Macau, Malta, Mozambique, Portugal and Singapore), as well as the creation of a strong network of international relationships with third parties, the firm aims to extend its expertise and services globally so as to ensure efficiency to complex issues with global implications. The TMT team at SRS Advogados has acquired in-depth knowledge of the telecommunications, media and information technologies sectors, and has participated in leading projects within the TMT sector in Portugal. Comprising over

ten lawyers and two partners, the team has extensive experience in the sector, in particular in electronic communications regulation, TV and media, including online media, internet, information society, electronic commerce, software, data protection and privacy.

Following 2020 – the year of the pandemic – 2021 looks set to be another challenging year, with the economy continuing to be significantly affected by the COVID-19 crisis, and all efforts still being focused on fighting the virus, most recently by widespread vaccination.

The pandemic has changed habits and forms of consumption. The retail business, for example, is changing location at an even faster rate. Physical stores are increasingly being replaced by online commerce. Delivery logistics chains are strengthening to keep up with the growth of e-commerce, and companies are increasing their investments in platforms which give them global access to the consumer.

The 5G Auction in Portugal

For all these reasons, one of the important events in 2021, throughout Europe and in Portugal, will be the emergence of the fifth-generation mobile services (5G). After a turbulent preparation process, delayed in 2020 by the closure of public services imposed by COVID-19, and continuing discussions with the mobile service network operators serving the Portuguese market, ANACOM – the Portuguese regulator of electronic communications and of postal services – launched the auction that will allocate the radio frequencies for 5G.

The rules of the auction have been widely challenged by the three mobile network operators active in Portugal. This has already led to legal proceedings challenging the auction and its rules before the Portuguese courts and to complaints to the European Commission.

However, despite the contestation, the auction advances. It provides for specific frequency allocation rules for new mobile operators and creates obligations for pre-existing mobile network operators to offer national roaming in favour of the former, thus seeking to create conditions for the emergence of new mobile operators in the Portuguese market, and increasing competition in the mobile segment.

For a long time, ANACOM has been critical of the functioning of the mobile services market, considering that the three existing operators are unduly accommodated. The regulator has regarded this auction as the opportunity to introduce more competition into the market. We will wait for its outcome, but it is foreseen that the mobile services market will be different when the auction ends and the frequencies are allocated. Only time will tell us if

emerging new players are able to compete effectively with pre-existing operators in an already mature market with very high voice and data penetration rates, good geographical coverage and affordable prices for most consumers.

This 5G spectrum allocation is essential for digital transformation. The digital economy presupposes an infrastructure that allows permanent connectivity from anywhere. This connectivity is ensured by new generation broadband networks, with high data-carrying capacity, at very high speeds and with very low latency. In mobile services, which allow ubiquitous connectivity, such infrastructure will be provided by 5G networks. Hence, the high economic value of the respective radio frequencies.

The Implications of 5G, Big Data and AI

The potential offered by 5G is enormous, with applications linked to the most varied industries, from automobiles to health, from financial services to the military. The amount of data that the new networks will be able to carry will be enormous. Allied to the enormous computing capacity that exists today, the possibilities, with artificial intelligence, to transport and process these enormous amounts of data (ie, big data) are truly transformational. Hence the importance of data and the care it requires, including from a legal point of view.

Cybersecurity is also crucial: an economy that functions based on communications networks and data is permanently exposed to cyber-attacks aimed precisely at obtaining data, information and all the potential that they hold.

New Technology and Legal Liability

It is another world, where human interaction with the machine will change and where human beings will be replaced in many tasks. For example, self-driving cars are under development, the result of the connectivity provided by 5G and big data. When we reflect on this reality and apply it to law, we understand that technology will also change many of the legal dogmas. Self-driving cars will have an impact on, for example, the rules of civil liability (and the insurance industry). How do we attribute "behaviour" (if one can speak of behaviour in this context)? How do we understand the concept of personal liability? How do we attribute responsibility? (A car accident due to a failure in the navigation software is attributed to whom? The manufacturer of the car? The person in charge of the software? The communications network that was disconnected for a moment and did not allow the application to be updated?)

In all industries, technology combined with 5G networks will allow uses that will greatly disrupt our rules of civil law and non-contractual liability. In the health sector, to choose another example, there is the possibility of performing surgery remotely. Failure, error – caused not by an individual, but by the technological means he or she uses – will force the creation of new legal frameworks. This will have an impact on the insurance industry, which will see the concept of risk changing in a material way.

The European Electronic Communications Code

In terms of legislative changes, 2021 will also be the year in which – throughout Europe, including Portugal – the European Electronic Communications Code (approved by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018, already amended) will finally begin to apply.

In addition to bringing together in a single text the essential regulation of electronic communications, which is now scattered over four key directives, the Code aims to standardise the interpretation of these concepts, update them and also resolve some problems to which the current framework has not been able to provide an adequate solution. One example is over-the-top (OTT) operators, and the competition they have brought to traditional service providers, who will now be subject to a set of obligations similar to those imposed on most traditional operators when they provide services which have the look and the feel of traditional services, in particular VoIP calling apps.

The new law is likely, in Portugal, to strictly implement the Code and not to bring many specificities, other than the intention of the government to eliminate public phones from universal service obligations. The government will soon approve the text of its draft legislation to be submitted to the Parliament and it is likely that it will not incorporate several suggestions from ANACOM, given the need to swiftly adopt the new implementing act.

One of the issues that ANACOM intended to be dealt with by the legislation implementing the Code was loyalty periods, to lower costs borne by consumers for early termination. ANACOM proposed that, in case of early termination, penalties charged by operators should be calculated as a percentage of the monthly fees payable by consumers for the remaining loyalty period.

Cloud Solutions

In the telecommunications industry, 2021 could still be a year of consolidation. With the "commoditisation" of voice services and of connectivity, many operators now focus their offerings on services delivered

from the cloud. This paradigm shift has led to some consolidation in the market, as well as to the appearance of new players.

Although the overwhelming use of cloud solutions in the Portuguese market shows that companies from all sectors have overcome a certain distrust in outsourcing non-core parts of their business to cloud service providers, international data transfers are still a growing concern. This affects Portugal's ties with traditional trading partners such as the USA and the UK. Following the Schrems II decision of the Court of Justice of the EU, the safeguards for international data transfers for the USA and other countries must be reinforced and additional safeguards obtained to ensure seamless data protection for EU data wherever they travel. This greatly affects cloud computer service providers from third countries, in particular from the USA. However, implementing Schrems II is challenging for companies, given the magnitude of the requirements introduced by the Court of Justice of the EU.

Brexit and Data Security

The same remarks apply to the uncertainty brought about by Brexit regarding data security. A solution is needed that allows the recognition of the UK as a country offering adequate protection for personal data. However, the transitional post-Brexit solution found to enable data transfers to the UK does not guarantee that such an outcome will be possible to achieve in a short timeframe. This is a concern for Portuguese companies, considering that the UK is one of the most important trading partners for Portugal.

Telecommunications Towers

Another area of consolidation is telecommunication towers. The last few years have seen the sale of part of the respective towers by the mobile network operators in Portugal. It is anticipated that this movement will continue, with an increase in business opportunities for the tower operators because of the auction for 5G, due to the need to develop and increase the geographical coverage of mobile networks.

Media

On the media side, 2020 was also an intense year, particularly in television, with one of the Portuguese main television operators being the subject of several takeover bids. Two are still in dispute. The dominance of the Portuguese television market remains intense, which has attracted and will continue to attract opportunities for legal work in the corporate and capital market areas, as well as in regulation. In fact, the way in which some shareholder changes have taken place, overlooking the control and

intervention of the regulatory authorities, has generated controversy, giving rise to several processes with the regulators of media, of capital markets and of competition.

Audio-Visual Services

It is also relevant to mention the approval of the law implementing the revised Audio-visual Media Services Directive (AVMS Directive) into national law.

One of the innovations brought by this legislation is the specific regulation of video-sharing platform providers, which fall under the obligation to actively protect consumers (including children) from harmful content and to regulate marketing activities and publicity, as well as to provide effective means to respond to complaints.

This is a ground-breaking change which makes the regulation of video-sharing platforms closer to that of television operators and, in that respect, introduces something close to a level playing field in services such as YouTube, TikTok or Facebook. One interesting aspect is that the media and audio-visual regulator, ERC, will oversee compliance of the platforms with the new obligations.

Finally, it should be noted that, due to the country-of-origin principle, the legislation will only apply to video-sharing platforms established in Portugal.

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