

“Convergence and Regulation”

Public Consultation

Lisbon, 15 February 2002

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EXECUTIVE SUMMARY

Objective

Given the need to provide the Government with sound analytical instruments that will enable the tracing of a regulatory framework for the broadcasting and telecommunications sectors in a convergence environment, and taking in due relevance the need to safeguard the public interest, this “Convergence and Regulations Initiative” is now presented, in result to the decision made by the Minister of the Presidency and Minister of Social Infrastructures¹ as set out in Joint Ministerial Ruling no. 863/2001, 26 June.

The process for the “Convergence and Regulation Initiative” involves a number of activities, of which this paper is part of and now open to public consultation for a period of sixty days, to collect and analyse contributions from all interested parties. The final result of this Public Consultation initiative will be submitted to Government on 31 May 2002.

Convergence

The rate of change in communications and broadcasting technologies witnessed these past few years, have brought to light a new concept – convergence. Without undermining the web of distinct interaction between these converging worlds, the consolidation effect can be seen in view of three different perspectives: the convergence of networks technology with equipment technology, the convergence of services, and the convergence of markets.

The current economic cycle is conducive to a convergent market, resulting precisely from the convergence of networks and service equipment, and broadcasting content. This trend is reflected in the mergers between economic groups positioned in different markets, and the subsequent entry sectors of other commercial activity. For example, cable television operators branching out to telecommunications and IT markets, by providing telephone and Internet access services. Telecommunications operators, in turn, have broadened their range of interests to the production and distribution of digital content, by merging with or buying content companies.

Markets

The liberalisation and opening of the television market was a driving force behind the transformations now taking place in the broadcasting sector in Portugal. This evolution, which had an impact at several levels, showed the trend towards the integration of traditional media towards a single conglomerate, and the distribution of audiovisual content by means of the new digital platforms available and the prevalence of contents in the communications value chain. More recently, communications groups have been investing in acquiring or forming partnerships with contents companies, choosing a vertical integration, combined with a horizontal concentration strategy.

The communications sector has been through great development in the past few years, particularly with the liberalisation of the landline services market, on the 1st of January 2000, and the expansion of the mobile service, which is currently accessible to most of the population. There has also been a greater search for new information technologies, with almost three million Internet users in the third quarter of 2001, representing a penetration rate of almost 30%. The telecommunications market has also been boosted by the development of new technological platforms such as UMTS and DVB-T.

Percussions associated to this novel technology setting

In a converging technological environment, the core elements that comprise telecommunications operator and broadcasters offer, can be identified as: the interactive content, multimedia services, combined with viable commercial access terms, and different network availability, all irrespective of the electronic network used (cable, public switched network, etc.).

The importance of content, as the legitimate form of individual expression, both for citizens and organisations of a democratic society, comprising a balanced social development on the

¹ *Ministros da Presidência e do Equipamento Social.*

one hand, and, the increasing subordination of content to corporate profit-making organisations, associated with their growing presence in virtual environments, raises fundamental issues that need to be addressed in the search for a healthy socio-economic development. Reflection on such issues and others that require further discussion, is raised by the public consultation document.

Special reference is here made to the more pressing issues:

- The need to protect freedom of speech, diversity and pluralism of culture, requires measures that control the pressure of economic and political power, as well as the politically influenced selection of content by broadcasters, to guarantee the removal of any barriers in the provision of, and access to, a variety of choice on offer;
- Guarantee consumer protection and enable consumers the benefit of the best service at affordable prices, and allow potential buyers access to any information required to make a free and conscientious selection;
- The promotion and general offer of broadband access, recognised to be increasingly important in the adoption and use of digital content services;
- Unconditional access to a certain number of general interest content on convergent platforms;
- Network neutrality in regards to content carried, not only for the benefit of consumers but also to enable proper market development;
- Promote the creation and distribution of high quality, original Portuguese content;
- Adoption of approved standards by market operators, promoting the interoperability between end-user devices and compatible technologies for different carriers and distribution networks;

- Contemplation of the role played by Public Service broadcasting and the universal telecommunications service, in promoting info-inclusion and guaranteeing social and cultural diversity;
- Prohibition of content if offensive to human dignity, and ensure the protection of minors and citizens with special needs, irrespective of the distribution method or access platform;
- Ensure copyright protection, as well as the succeeding and associated rights derived from technology convergence;
- Guarantee the privacy of sensitive data, of both individuals and organisations, given the variety of methods that facilitate the collection, storage and processing of personal data;
- Ensure the integrity of e-commerce and the security of electronic transactions, as being fundamental to the development of a strong and balanced social and economic future;
- Clearly define the issues affecting regulation in a convergent environment, reflecting the new communications technologies that bring huge choice and great expansion of services, and associated concerns.

Future Regulatory Framework

In Europe there is a general consensus regarding the direction regulatory bodies are taking and the foreseen requirements involved, which include:

- Independence from political and economic power;
- A need to reinforce co-operation between organisations with of similar activities at community level and also involved in tracking convergence, notably in such areas as electronic communications, media and competition;

- Promotion of self-regulation and co-regulating instruments, including all market players, in harmony with the different interests at play, and regulatory authorities.

The dynamic nature irrevocably linked to the communications and media sectors is primarily a result of the disruptive technologies that affect the sector, and the inevitable consequences these have on the offer of services available. The reinforcing and intricate development between these sectors highlights the need for further reflection upon the current state of the regulatory authorities.

The “Convergence and Regulation Initiative” Expert Group, comprised by a number of citizens of recognised merit and experience in the communications and media sectors, appointed by the Joint Ministerial Ruling no. 987/2001 of 08 October 2001, reached the conclusion that convergence should not recommend the organic separation of content regulation from network and access regulation, and accepted the possibility of a single entity being responsible for regulating both of these, notwithstanding their distinct interests and values. The argument for an organic unity – characterised by the existence of a single, national regulator, equipped with the variety of attributes and competencies needed to regulate the industry, currently divided amongst several entities – is based on the need for efficiency, and should not be confused with the identification of two separate regulations, which have different values and objectives.

JUSTIFICATORY NOTE

This “Convergence and Regulation Initiative” was launched in accordance to the terms of a joint decision of the Minister of the Presidency and Minister of Social Infrastructures, described in the Joint Ministerial Ruling no. 863/2001, 26th of June, aimed at providing the government with sound analytical information that will enable the tracing of a clear regulatory framework for the broadcasting and telecommunications sectors in a convergence environment, in light of the need to assure and safeguard public interest principles (such as guaranteeing universal access, the promotion of diversity and pluralism in society, reinforcement of citizenship and protection of consumer interests).

In the belief that a thorough definition of coherent guidelines on the convergence domain should include the joint involvement of the *Instituto da Comunicação Social* and *Instituto das Comunicações de Portugal* (currently *ICP-Anacom*), the chairmen of the above two institutes were given the task of launching and co-ordinating this initiative, to conclude with the presentation of a combination of sound strategic proposals to the Government.

For this purpose a special task force was formed, by the set deadline of September 30th 2001, to elaborate a document that specifies and identifies the series of relevant issues raised by convergence. This task force included an equal number of individuals from each of the above mentioned institutes and named by their respective Chairmen.

The resultant study was then presented to a group citizens of recognised merit and experience in the communications and media sectors, appointed by the Joint Ministerial Ruling no. 987/2001, 8 October 2001, issued by the Minister of the Presidency and Minister of Social Infrastructures and hereafter referred to as the “*Expert Group*” in expressing their observations and contributions.

This document is composed of the different reflections from the Expert Group, and is now submitted to public consultation for the period of sixty days. The final result of the *Convergence and Regulations Initiative* will be submitted to the Government on the 31st of May, 2002.

Recognising the complexity of issues and topics discussed in this document, we have endeavoured to present all information in a clear and comprehensible manner, for the benefit of all individuals interested in the reading and discussion of the Public Consultation.

All contributions to the consultation should be sent in writing, properly identified, to either of the addresses listed below and received by the 15th of April 2002. After this date, no submission can be considered.

Conclusions to be drawn from this consultation will be made public as soon as possible, accompanied by a list of all participants and respective contributions, unless a prior request for confidentiality has been clearly expressed.

All contributions must make reference to the Convergence and Regulations Initiative and be sent (*preferably by e-mail*) to one of the following addresses.

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TOPICS of DISCUSSION

Promotion of competition, concentration and pluralism

1. *Considering the many problems raised by the concentration and the impact this has upon the economic, social and cultural activity, in what way can a regulatory framework, and regulation activity in general, anticipate and caution the diversity of interests that may arise with the horizontal and vertical integration of economic agents?*

Consumer Protection

2. *What mechanisms could or should be reinforced and developed to protect consumer interests, if market conditions and open competitiveness are seen to be insufficient.*

Network Neutrality

3. *In the delivery of contents and services, how can network neutrality be assured?*

4. *Should network ownership, in respect of type and number, be restricted? If so, according to what parameters?*

Interoperability

5. *In what way should or can the development and adoption of certain standards be encouraged by acting economic agents, considering the interoperability of services and equipment, without harming the evolution of market activity?*

Walled Gardens

6. *Given the importance new converging platforms have in the promotion and mass adoption of the Information Society, as the preferred form of distribution and presentation for education, culture and commercial services, amongst others, how can such objectives be stimulated? Should certain rules or limits to the establishment of walled gardens be used, which offers only a certain number of services on a convergent platform?*

Electronic Programming Guides and Similar Services

7. *Should the use and development of this service be restricted to any specific regulatory intervention? How and by whom, should the efficient implementation of this service be guaranteed?*

Contents

8. *How can we reconcile the ongoing promotion of content diversity, innovation and quality, positively contributing towards the improvement of education and raising the standards of citizens' cultural demands, with the creation of market stimulating activities?*

Media Financing

9. *How can free to air broadcasters' position be safeguarded, to insure their survival in an increasingly competitive market, and when traditional revenue streams are challenged? What new revenue sources can be found by television broadcasters, particularly market entrants?*

Public Service Broadcasting

10. *What implications can the growing diversity of programmes broadcast on television, due to the new technological context, have on the structure and the provision of public service broadcasting?*

11. *Should the Public Service broadcasting mission include a wider range of contents, services and technology platforms? If so, what should these include?*

Universal Telecommunications Service and Info-Inclusion

12. *What should the scope of application of the universal service be in the context of convergence? What kind of broadband strategy should be adopted?*

13. *What mechanisms can be used and how can access to communications by citizens with special needs be improved? How can the universal service encourage this?*

Copyright Issues

14. How to guarantee and safeguard a fair balance of rights between the different categories of copyright holders and consumers of works and services under copyright protection? In particular, what consideration should be given to the rights of the economic rights holders of contents and services, when these differ to the interests of the authors?

Penalties and Sanctions

15. In a convergent environment, what penalties and sanctions are adequate, and effective towards insuring a proper compliance to regulations?

Future Regulation Model

16. How to make vertical regulation compatible with horizontal regulation? Would it be appropriate to adopt a convergent legal framework, which includes competencies and responsibilities now shared by several bodies, considering the need for autonomy? If so, in what way and with what limits? Should the afore mentioned aggregation maintain the current distinction between the media and communications?

17. Should the regulatory authorities be given additional intervening powers, by means of regulations that ensure prompt and appropriate reaction to the requirements of a dynamic and developing market?

Self Regulating Mechanisms

18. What role can or should self-regulation play towards achieving public interest and economic objectives?