

**Analysis of the impact of the amendment of Law no 23/96,**

**"Law of essential public services"**

**on electronic communications and postal services**

**Law no 12/2008 of 26 February** has been published, as the first **amendment to Law no 23/96 of 26 July** which establishes in legislation certain legal mechanisms to protect the users of essential public services.

This law republishes and renumbers, in the annex thereto, Law no 23/96.

The main innovation of this legislative amendment is the extension of the scope of the application of the law which, specifically, now **covers electronic communications services and postal services**, hereafter considered essential public services.

It is, therefore, necessary to analyse the impact and consequences that this legislative option has on the two sectors.

**It is noted that:**

- Under Article 3 of Law no 12/2008, this law shall apply to relationships in force on the date it takes effect;
- Under the terms of article 4 of Law no 12/2008, the law enters into force 90 days following its publication **on 26 May 2008**;
- Under article 14 of republished Law no 23/96, **all legal provisions that grant advantages to the user in a specific situation shall be preserved.**

## **I. Electronic Communications**

### **Article 1 Scope and aim**

**Point d) of paragraph 2** of article 1 of Law No. 23/96 referred to the "Telephone service", which was thereby included in the purpose of this Act. Subsequently, pursuant to Law no 5/2004 of 10 February (**Law of Electronic Communications - LEC**) the service was excluded from the scope of application of Law no 23/96 and also of Decree Law no 195/99 of June 8 (establishing the prohibition of demanding security to guarantee the fulfilment of obligations with respect to the supply of essential public services) - see paragraph 2 of article 127 of Law no 5/2004.

With the publication of Law no 12/2008, **point d) of paragraph 2** was amended to make reference to "electronic communications services", which implies the **tacit repeal of paragraph 2 of article 127 of the LEC**.

Accordingly, electronic communications services are not only covered by the law of essential services, but will also be subject to the application of Decree-Law no 195/99.

The application of Decree-Law no 195/99 to electronic communications services is important and is a big change with respect to the regime of the LEC, currently in force, since it prevents the providers of these services from requiring the provision of a security deposit, except in the event that contractual breach has occurred on the part of the consumer.

The LEC, in addition to not prohibiting the collection of security, expressly acknowledges its applicability in certain situations.

This is the case in which providers of the universal service, being unable to refuse to be contracted (contrary to the situation with other companies offering networks and electronic communications services), may require the provision of guarantees from subscribers who have amounts outstanding in respect of previous contracts, even where these were entered into with another company (see **article 46, paragraphs 5 and 6 of the Law**).

In this case, **the provisions of the LEC cease to apply, whereby paragraph 6 of article 46 is considered deleted *in fine*** (*"without prejudice to their right to demand the provision of guarantees"*).

## **Article 2 - Right to Participate**

**Paragraph 1** of this article requires that representative bodies are consulted with regard to the preparation of any act (law, decree-law, regulation, etc.) defining the legal framework of any electronic communications service, now described as essential public services.

In respect of its regulatory powers, ANACOM is already bound by this consultation by virtue of its Statutes (Article 11 of the Statutes of ICP-ANACOM, as approved by Decree no 309/2001 of 7 December).

With regard to **the 2nd part of paragraph 1**, its application to electronic communications is only set out in the context of universal service, the provision of which also includes a concession agreement between the Portuguese State and PT Comunicações S.A..

## **Article 4 - Information requirement**

In terms of information to "users", **sectoral legislation and regulation establishes a set of specific obligations** for providers of electronic communications services.

The **LEC** provides in **article 39, paragraph 1, point b)** that all users of publically available electronic communications services are entitled to be provided, in a timely manner and prior to conclusion of any contract, with written information on the conditions governing access to and use of said service.

Additionally, companies providing publicly available telephone services (fixed and mobile) are required to make available to the public, especially to all consumers, transparent and current information on applicable prices and on the usual terms and conditions governing access to and use of the respective

services (see **article 47, paragraph 1**). In **paragraph 2 of article 47** the information that shall be made available is listed in detail.

In addition to the provisions of the LEC, ANACOM, by **determination of 21.04.2006** defined the *object and form of public disclosure of the conditions of offer and use of electronic communication service*.

Whereas **article 4 of Law no 23/96** in no way strengthens the protection of the users of these services, **by force of art 14 of Law no 23/96, the application of the sectoral regime shall prevail.**

#### **Article 5 - Suspension of the public service supply**

This article will require that **the suspension of service, in any case** (except due to unforeseeable circumstances or force majeure), may **only** occur where appropriate prior notice is given to the user, and **in case of late payment**, where such notice is given in writing at least **10 days in advance**.

Article 5 **removes the application, in this regard, of point a) of paragraph 2 of article 39 and of paragraph 1 of article 52, both of the LEC**, which requires appropriate prior notice to be given to subscribers of all the publically available services and of 8 days to subscribers of telephone services, respectively, in case of suspension for non-payment of bills.

This legislative amendment will have **inevitable consequences in the Contracts** governing the provision of electronic communications services.

#### **Article 8 - Minimum consumption and meters**

**Paragraph 1** of this article prohibits the imposition of minimum consumption.

In the context of electronic communications, the only possible interpretation is that the aim is to prohibit **obligatory minimum consumption**, whereby this does not preclude the existence of voluntary *flat rate* options or other alternative tariff schemes.

With regard to **paragraph 2** of the article, mention should be made of **point d)**.

**Point d)** prohibits that users are charged *"any other fee (...) charged for the alteration of service provision conditions or equipment used for this purpose, except where the user explicitly so requests"*.

This point **does not apply to electronic communications services** where, in return for provision of services, subscribers pay prices and not fees<sup>1</sup>.

**Therefore, there is deemed to be no contradiction with the provisions of article 48, paragraph 3 of the LEC, which allows a unilateral change of contract terms by the service provider**, provided that the provider gives prior notice of not less than one month to subscribers, granting subscribers a right to withdraw from such contracts without penalty in the event that they do not accept the new conditions, within the time limit set out in the contract.

## **Article 9 - Billing**

**Paragraph 2** of this article is **applicable to all electronic communications services**, whereby the respective suppliers **are obliged to bill their customers on a monthly basis**, regardless of the consumption or value that is at issue.

## **Article 10 - Prescription and expiry**

The LEC has not established any specific provisions for prescription and expiration, whereby **the regime provided for in this article shall apply in full to electronic communications**.

In accordance with the provisions of **paragraphs 1 and 2, the right to receive payment for the provided service shall be extinguished within six months from being provided**, and if, for whatever reason, including a mistake by the service provider, **the sum paid is below the amount** that corresponds to

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<sup>1</sup> As Marcelo Caetano defines, **fee** "is the price payable for the services provided by public services managed by legal persons of public law" (Marcelo Caetano, Principles, 1977, page 283). This concept is different to **price**, which corresponds to consideration for a service, due to fulfilment of an obligation that emerges from a contract with a private company to provide a service that, in this context, is electronic communications.

effective consumption, **the right of the provider to demand the difference expires six months after the date on which the payment was made..**

Attention is called to the fact that the amendment to the right ***to receive payment***, in place of the right *to demand payment* as referenced in Law no 23/96 in its original wording, cannot be more favourable to the consumer. Indeed, the fact that there will be a period of only 6 months to receive the amount of outstanding bills could increase conflict and aggravate measures against defaulting subscribers, resulting specifically in the increase of enforcement cases.

The rule set out in **paragraph 3** is also a new development for electronic communications services: **the demand of any payment** has to be undertaken **in writing 10 working days prior** to the deadline.

Not being a rule on barring by time, although inserted in article 10, it will also have **relevance in contracts governing the provision of electronic communications services.**

### **Article 11 - Burden of Proof**

This is a new article with respect to the Law of 1996 and one which now also applies to providers of electronic communication services, who now have the **burden of proof** in respect of all facts related to compliance with obligations and the performance of diligences arising from the provision of services.

Under the terms of **paragraph 2**, the burden of proof also falls on the service provider with respect to the notifications referred to in article 10, related to the requirement to pay and the time at which such notifications were made.

### **Article 13 - Mandatory nature of rights**

An important consequence of the inclusion of electronic communications services within the scope of this Law arises with respect to article 13 which guarantees **invalidity**, which only can be invoked by users, of any convention or provision which excludes or limits rights granted to users by this law.

However, **the law does not establish a sanction regime** which effectively punishes the companies that fail to fulfil their established obligations, which, in many cases, may transform the rights of users to mere statements of principles, **jeopardising the effectiveness of the regime**.

## **II. POSTAL SERVICES**

### **Article 1 Scope and aim**

Postal services now feature in the list of essential public services under the new **point e) of paragraph 2**. The scope of application of Law no 23/96 has accordingly increased to cover all and any postal service, as defined in Law no 102/99 of 26 July (Basic Law for Postal Services)<sup>2</sup>.

However, a good part of the obligations set out in Law no 23/96 may not be effectively applied to postal services, primarily because they seldom take on the nature of continuously supplied services, being more often provided on a sporadic basis.

### **Article 2 - Right to Participate**

The right of the organisations representing consumers to be heard is already explicitly enshrined in **sectoral legislation** with respect to certain regulatory instruments. Article 17 of Law no 102/99 sets out that **approval of the operation regulation of postal services** as well as the conclusion of **conventions on quality and price with respect to the universal postal service** shall be preceded by hearings of said organisations.

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<sup>2</sup> In accordance with paragraph 1 of Article 4 of this Law, the postal service is *"the activity encompassing the operations of acceptance, processing, transport and distribution of postal items"*.

This right has been respected with respect to the various conventions agreed between ANACOM and CTT. Pursuant to **paragraph 2 of Article 2** of Law no 23/96, the period to be granted so that consulted organisations may comment will have to be at least **15 (working) days**, which will have **an impact on the process of negotiating conventions**.

Moreover, the fact that the organisations representing consumers have the right to be heard regarding the **"acts defining the legal framework of public services"** means that, beyond being consulted about a possible draft regulation of operation, they will also be heard on the future draft legislation with respect to the transposition of the new Postal Directive, which introduces full liberalisation of the sector as of 2011.

#### **Article 4 - Information requirement**

Sectoral legislation [see Base VIII, paragraph 1, f) and m) of the Bases of the Concession, as approved by Decree-Law no 448/99 of 4 November<sup>3</sup>, and Article 18, paragraph 1, d) of Decree-Law no 150/2001 of 7 May] imposes obligations on providers in respect of more detailed and specific information for users than that under the Law of essential public services. Accordingly, **the provisions of Article 4 of Law No. 23/96 in no way enhance the protection of users of postal services, falling short of sectoral rules, whereby these shall prevail, by virtue of Article 14 of the same Law.**

#### **Article 5 - Suspension of the public service supply**

The principle enshrined in **paragraph 1 of Article 5** does not give greater protection to users than the existing **sectoral rules** on the suspension of postal services.

On the one hand, the Concession itself contains a system to ensure continuity and availability in the provision of concession services [see Bases VIII, paragraph 1, b); XX, paragraph 1, d), XXX; XXIX, paragraph 2, a) and XXXVII,

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<sup>3</sup> This law was amended by Decree-Law no 116/2003 of 12 June and by Decree-Law no 112/2006 of 9 June.



paragraph 2], on the other hand, Decree-Law no 150/2001, as amended by Decree-Law no 116/2003 [Article 18, paragraph 1, e) and f)], imposes on most providers the obligation to *"announce in a suitable manner and with a minimum prior notice of 10 days the total or partial suspension of services, except in accidental circumstances or cases of force majeure"* and further *"publicise in a suitable manner and with minimum prior notice of 30 days the total or partial withdrawal of services provided"*, thereby establishing the term of notice. **These rules exclude the application of paragraph 1 of Article 5 of Law no 23/96, taking into account the provisions of Article 14 of this Law**

For its part, the rules of **paragraphs 2 to 4 of Article 5** of Law no 23/96 will have limited applicability to the provision of postal services, since said services are, for the most part, rendered sporadically.

#### **Article 9 - Billing**

The obligation of monthly billing enshrined in this article is, naturally, **not applicable** to postal services due to their particular characteristics.

#### **Article 10 - Prescription and expiry**

The rules set out herein **are not applicable to the majority of postal services** whose provision, as previously mentioned, is sporadic in nature.