

Portugal

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1. LEGAL FRAMEWORK

The Portuguese state media regulatory entity is the ERC (the English unofficial translation is Regulatory Entity for the Media, while the Portuguese name is *Entidade Reguladora para a Comunicação Social*¹), which is an independent administrative body. It is a legal entity, is subject to public law and has administrative and financial autonomy. It was created in 2005 by Law no. 53/2005 of November, 8 (the ERC's statutes are annexed to this law)². This is the body responsible for regulating media content in Portugal, specifically on television, radio and in the press. It is the only regulatory body with constitutional protection (article 39, on media regulation, of the Constitution of the Portuguese Republic³). Other laws also apply to the ERC's activities: Television Law⁴; Decree-Law no. 103/2006 which establishes the regime of regulation and supervision taxes⁵; Radio Law⁶; Press Law⁷; Contract of Public

¹ <http://www.erc.pt/pt/>, accessed 15.06.2012.

² Law no. 53/2005 of November, 8 [in Portuguese: www.erc.pt/documentos/legislacaosite/lei53.pdf, accessed 15.06.2012].

³ Constitution of the Portuguese Republic [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=126&lang=pt>, accessed 15.06.2012].

⁴ Television Law no. 8/2011 of April, 11 [in Portuguese: www.gmcs.pt/download.php?dir=121.549&file=lei_tv.pdf, accessed 15.06.2012]. This law replaces Law no. 27/2007 of July, 30 and transposes Directive no. 89/552/CEE, based on the lettering of Directive no. 97/36/CE and no. 2007/65/CE.

⁵ Decree-Law no. 103/2006 of June, 7, amended by the Decree-Law no. 70/2009 (March, 31), on regulation and supervision taxes [<http://dre.pt/pdf1sdip/2009/03/06300/0194901961.pdf>, accessed 15.06.2012].

⁶ Radio Law no. 54/2010 of December, 24 [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=1547&lang=pt>, accessed 15.06.2012].

⁷ Press Law no. 2/99, of January, 13, modified by Declaration no. 9/99. (February, 18) and by article no. 57 of Law no. 18/2003, of June, 11 [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=88&lang=pt>, accessed 15.06.2012].

Service Television⁸; Contract of Public Service Radio⁹; Contract with the Portuguese news agency called *Agência Lusa*¹⁰; and the Code of Advertising¹¹.

Despite the fact that the ERC is the body responsible for media content regulation in Portugal, there are several entities that also play a significant role in this matter, such as ANACOM¹², AdC¹³ and *Gabinete para os Meios de Comunicação Social*¹⁴, whose functions and legal framework are described in the next few paragraphs.

On one hand, the National Authority for Communications (ANACOM - *Autoridade Nacional de Comunicações*) is in charge of the regulation and supervision of the electronic and postal communications sector in Portugal. It promotes competition and protects the interests of citizens, ensuring the provision of clear information and transparency in terms of tariffs and conditions for the use of services. It also encourages the development of communication markets and networks.

On the other hand, the Competition Authority (PCA or, in Portuguese, AdC - *Autoridade da Concorrência*) has duties of ensuring compliance with competition rules, having regulatory, supervisory and disciplinary powers in relation to the approval of regulations required to enforce a competitive environment, as well as to the identification and investigation of prejudicial practices to free competition regarding national and Community laws. Moreover, it decides on notifications of mergers and acquisitions and prepares and decides on anti-trust cases, using sanctions or preventive measures.

The state agency for the media (GMCS - *Gabinete para os Meios de Comunicação Social*) began its activity in 2007 and it has as its main objective to support the government in the conception, implementation and evaluation of public policy in the media field.

All these entities share, somehow, the duties of regulation and supervision of the Portuguese media sphere and there are no records of strong misunderstandings between them. Nevertheless, situations of conflict have arisen in the past, especially between the ERC and ANACOM, as outlined above.

In the Portuguese mediascape, there are no mechanisms of self-regulation or co-regulation actually performing their activities on a daily basis. However, there are some experiences with self-regulation but they occur within the confined space of newsrooms. This specific case, for example, includes mechanisms such as newsroom councils, internal codes of procedures; in another instance, the role of ombudsman can also be mentioned (one for

⁸ Contract of Public Service Television, dated March, 8 of 2008 [in Portuguese: www.gmcs.pt/download.php?dir=27.188&file=cont._conc._serv._p%FAblico_televis%E3o.pdf, accessed 15.06.2012].

⁹ Contract of Public Service Radio, dated June, 30 of 1999 [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=106&lang=pt>, accessed 15.06.2012].

¹⁰ Contract with the news agency called Agência Lusa, dated July, 31 of 2007 [in Portuguese: www.gmcs.pt/GMCS/cpsip/contrato_Estado_Lusa.pdf, accessed 15.06.2012].

¹¹ Code of Advertising – Decree-Law no. 330/90 (October, 23), modified by Decree-Law no. 74/93 (March, 10), Decree-Law no. 6/95 (January, 17), Decree-Law no. 61/97 (March, 25), Law no. 31-A/98 (July, 14), Decree-Law no. 275/98 (September, 9), Decree-Law no. 51/2001 (February, 15), Decree-Law no. 332/2001 (December, 24), Decree-Law no. 81/2002 (April, 4), Law no. 32/2003 (August, 22), Decree-Law no. 224/2004 (December, 4), Law no. 37/2007 (August, 14), Decree-Law no. 57/2008 (March, 26) and Law no. 8/2011 (April, 11) [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=124&lang=pt>, accessed 15.06.2012.]

¹² <http://www.anacom.pt/render.jsp?languageId=1>, accessed 15.06.2012.

¹³ <http://www.concorrenca.pt/vEN/Pages/Homepage-AdC-vEN.aspx>, accessed 15.06.2012.

¹⁴ <http://www.gmcs.pt/index.php?op=cont&cid=77&sid=314>, accessed 15.06.2012.

the press and one for radio and television), as well as experiences of readers' letters. As Fidalgo¹⁵ states (2009: 385), the Code of Ethics for journalists and the Council of Ethics of the Portuguese Journalists' Union can also be placed within self-regulation, taking into account their character as instruments that "imply all the professional group [of journalists] as such".

There is an example of self-regulation in which the ERC has played a very important role as promoter of the initiative. This concerns the case of an agreement on the classification of television programs among the television operators (the public service broadcaster, RTP, and the private broadcasters, SIC and TVI), dated September 2006¹⁶. The ERC has the legal and statutory duty (prescribed in article 9 of Law no. 53/2005) of promoting co-regulation and encouraging the "adoption of mechanisms of self-regulation by the entities that pursue media activities as well as by trade unions, associations or other entities of the sector". Despite this legal reference to other mechanisms of regulation, there are no formal or established links between the ERC and other self-regulatory or co-regulatory structures. On the other hand, the cooperation between the ERC and other regulatory bodies is required, namely in cases of acquisition of media companies, as explained before, or when defining the "economically relevant markets" is needed. In the first case, the ERC has the legal duty to issue an opinion on subjects of media property takeover (article 24, no. 3, paragraph p) but the final decision is made by the National Authority for Communications (ANACOM). Another example of is the joint determination between the ERC and the Competition Authority (AdC) of the "economically relevant markets" in the media sector (article 24, no. 3, paragraph o), which is a concept that has led to controversy and might need clarification.

2. FUNCTIONS

The ERC is responsible for the regulation of the audiovisual sector (excluding on demand media services) as well as of general media content, including the print media and news agencies.

According to its Statutes (article 8), it has the following main functions:

- To ensure the free exercise of the right to information and of press freedom;
- To ensure non-concentration of ownership in media companies aimed at the protection of pluralism and of diversity, without prejudice to competencies of the Competition Authority;
- To ensure the independence from the political and economic powers of entities pursuing media activities;
- To ensure the respect for citizen's rights, liberties and guarantees (in Portuguese, commonly known as DLG's – *Direitos, Liberdades e Garantias*);
- To assure the effective expression and confrontation of the various currents of opinion in respect of the principle of pluralism and of the editorial guidelines of each media company;

¹⁵ Fidalgo, J. (2009) *O Lugar da Ética e da Auto-regulação na Identidade Profissional dos Jornalistas*. Lisboa: Fundação Calouste Gulbenkian/Fundação para a Ciência e Tecnologia (FCT).

¹⁶ In Portuguese: www.gmcs.pt/download.php?dir=58.318&file=classificacao_programas_tv.pdf, accessed 16.06.2012

- To assure the exercise of the rights to broadcast, the right of reply as well as the right of political reply;
- To assure, in conjunction with the Competition Authority (AdC), the regular and efficient functioning of print and audiovisual markets, based on conditions of equity and transparency;
- To collaborate in the definition of policies and strategies that underlie the radio spectrum planning, without prejudice of tasks assigned by law to ANACOM;
- To monitor compliance by advertising campaigns developed by the State, Autonomous Regions and local government authorities with the constitutional principles of fairness and impartiality of Public Administration;
- To ensure compliance with regulatory standards established for media activities.

To summarize, the ERC's scope of activity, of intervention and supervision includes entities pursuing media activities under the jurisdiction of the Portuguese state, namely the news agencies, persons who, individually or collectively, edit periodic publications regardless of their distribution mean and radio and television operators (including content broadcast electronically).

3. LEGITIMIZING / UNDERLYING VALUES

The fact that the state media regulatory body is enshrined in the Constitution of the Portuguese Republic is an extraordinary example of the importance given to media regulation. Similarly significant is the establishment of the ERC as an independent administrative entity financially autonomous (article 39 of the Constitution).

Based on this legal framework and on Law no. 53/2005 that created ERC, it is possible to draw some general considerations which might help the reader to understand the value and main goals of media regulation, in general, and of the ERC's activity, in particular:

- To safeguard and promote freedom of expression, freedom of enterprise and the right to inform and to be informed;
- To protect rights, freedoms and guarantees of citizens (namely the right to personality, the right to privacy, the right to equality, among many others);
- To prevent concentration of media ownership;
- To guarantee plurality of opinions and voices and diversity;
- To safeguard independence from political and economic powers.

The state media regulatory entity currently operating in Portugal replaced, with some significant changes, its predecessor called *Alta Autoridade para a Comunicação Social* (AACS; High Authority for the Media, in English). In fact, the implementation of another entity responsible for media regulation in 2005 introduced a relevant feature in the Portuguese context since the ERC is the only regulatory body which has constitutional protection.

The Portuguese Constitution enshrines media regulation in Portugal since 1976 but it was the constitutional revision of 1989 that opened the range to public regulation of

all media sectors. At that time, media regulation was undertaken by the High Authority, leaving behind a tradition of regulation of state media bodies only (as it was developed by the Press Council, for example). The subsequent constitutional revision in 2004 introduced the notion of public regulatory intervention in the media field on behalf of the citizens' rights and principles of freedom of the press and of information (articles 37 to 39 of the Portuguese Constitution).

There is no determined hierarchy of values justifying media regulation in Portugal by way of the reading of laws but rather there are some more or less explicit references to the freedom of speech and of the press, the citizens' right to information, to inform and to be informed as well as the protection of their fundamental rights, the guarantee of pluralism and diversity and the quality of information. In fact, Augusto Santos Silva, the minister responsible for the initiative that created the ERC, explains that the option for the name should not only be decisive but, most of all, meaningful. The reference to a regulatory entity *for* the media was meant to represent a constant concern with citizens: "it is preferable to talk about regulation for the media emphasizing a double scope: in favour of the media, towards citizens" (Silva¹⁷, 2007: 19).

4. PERFORMANCE

Regarding the ERC's performative dimension on a daily basis, there is a set of tasks that it is responsible for, namely the reception and managing of complaints (either from individual citizens or from institutions), the registration and classification of audiovisual program services, the regular supervision and monitoring of audiovisual content (for example, compliance with the legally established quotas for the playing of Portuguese music in radio or the quotas for advertising breaks on television).

One of the most controversial issues is related to the right of reply in the press. There has been a vigorous debate for many years amongst media professionals, the regulator and researchers on the establishment of some self-regulatory mechanism as, among other reasons, it is time-consuming and resource intensive for the state media regulator to deal with this matter. Nevertheless, dealing with all situations involving the right of reply is one of the tasks currently performed by the ERC.

In general, the daily performance of the state media regulatory body is consistent with legal requirements concerning it and there are no major discrepancies between what it is supposed to do and what it really does, although there are some comments and complaints about there being an excessive range of competences mentioned in the law.

The character of decisions made by the ERC is, most of the times, binding, although citizens, media companies or other actors can appeal to the courts. It is worth noting that the same procedure has to be undergone when it is intended to begin any kind of judicial process in the civil courts.

¹⁷ Silva, A. S. (2007) 'A hetero-regulação dos meios de comunicação social'. *Comunicação e Sociedade*, 11: 15-27.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

Although an independent administrative entity, the ERC is accountable to the Parliament, and it also has to submit the mandatory annual reports. In fact, most of the ERC's budget comes from the Parliament, which also indicates a certain degree of commitment.

The annual report includes an analysis of the current state of the media field as well as a description of the ongoing activities and expenses incurred in the correspondent year by the regulatory body.

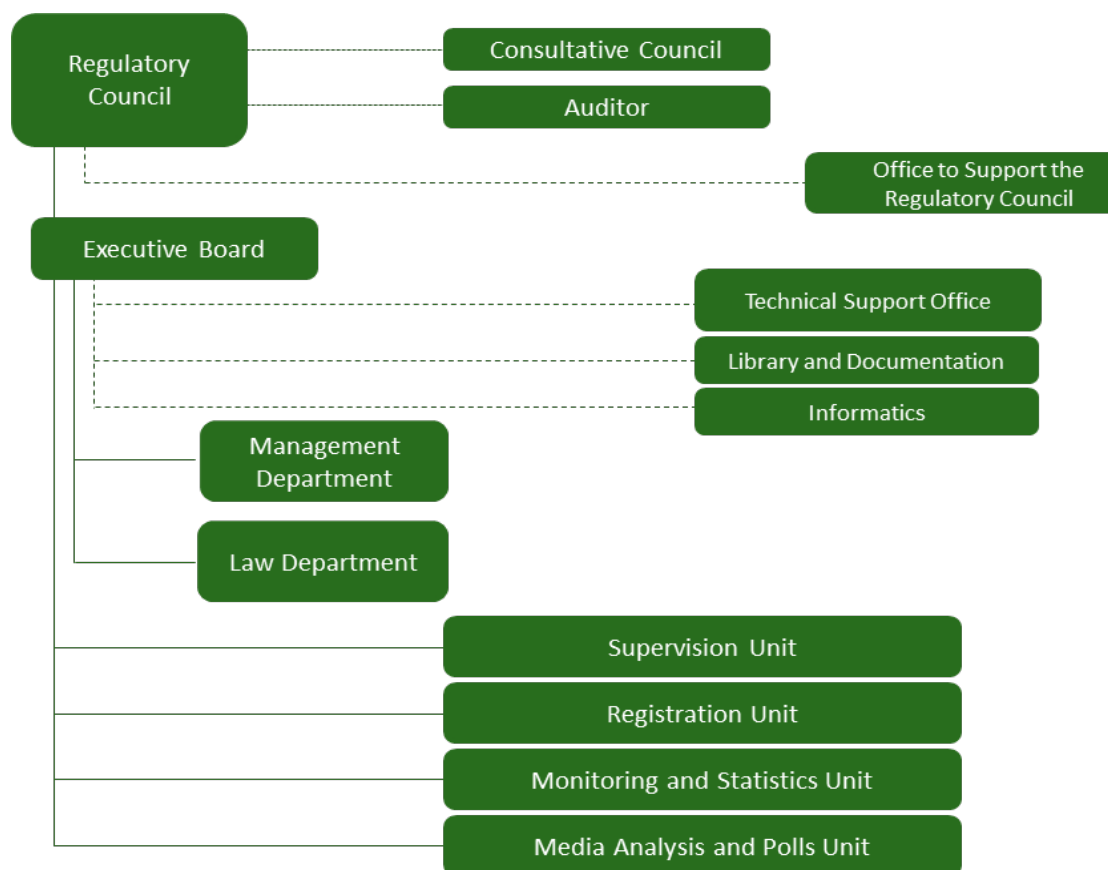
There is a set of enforcement mechanisms normally used by the Regulatory Council in cases of misconduct or non-compliance of media. Addressing warnings, recommendations and reminders are the most commonly made decisions but there are also other sanctions that have not been used so frequently. All these forms of enforcement are discussed and voted upon during the Regulatory Council's meetings, based on the analysis of the circumstances developed by any of the ERC's specialized departments, described in the next section.

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

The internal organization of the ERC is not very complex since it is divided into four main thematic areas that deal with certain matters and act in accordance with legal requirements specifically addressed to the same issue.

The ERC's structure is divided into departments, units, and offices:

- Law Department;
- Management Department;
- Supervision Unit;
- Registration Unit;
- Monitoring and Statistics Unit;
- Media Analysis and Polls Unit;
- Office to Support the Regulatory Council;
- Technical Support Office;
- Library and Documentation;
- Informatics.



The law does not foresee a total number of staff for the ERC. Nevertheless, according to its latest annual report on activities and budget¹⁸, there were 66 members of staff at the end of December 2010 (45 female workers and 21 males), most of them aged between 25 and 29 and 30 and 34. Moreover, in general, the average age of workers is 42 years old: 40 years old in females and 47 in males. Regarding wages, the total amount of expenses with employees is, according to the same report, of 2.097.739,29 Euros in 2010 and 1.993.534,20 Euros in 2009. A total of 26 employees had a contract of employment based on the Portuguese Labor Code in 2010 and only 2 employees worked on the basis of services provision. According to data gathered from previous annual reports on the ERC's activities and finances, by the end of the year 2009, there were 72 people working at the ERC (47 women and 25 men), which represents an increase when compared to the previous year (60 members of staff in December of 2008).

The Regulatory Council is the ERC's highest decision-making body and it is comprised of five members elected for a period of five non-renewable years: four of them are appointed by the Parliament and the fifth member is co-opted by the appointed members. Re-elections are not possible. The members shall be persons "of recognizable reliability, independence and with technical and professional competence" (article 18, no. 1 of Law no. 53/2005), who shall "perform their duties with exemption, rigor, independence and high sense of responsibility" (article 20, no.3). This is the organism responsible for the determination

¹⁸ Available online at <http://www.erc.pt/documentos/Relatorios/v3-erc-rac-2010/index.html> [accessed 01.03.2012].

and implementation of guidelines of regulatory activity, the approval of annual reports of activities (as well as plans and budget), the approval of deliberations and general guidelines regarding the activity of media actors under its scope of intervention, the approval of internal rules and procedures and the organization of human resources. The general competences of this Council can be subsumed in the following topics (INDIREG, 2010: 13)¹⁹:

- To “ensure that the content of media operators (press, radio, tv), respect principles and requirements legally prescribed”;
- To “grant licenses to radio and television operators”;
- To “monitor the way they use those licenses”;
- To “rule on any complaints by the public regarding media misbehavior”;
- To “make a binding statement for the appointment of editors-in-chief for the Public Broadcasting Service”;
- To “give opinion on transactions concerning media ownership and media concentration”.

The Regulatory Council’s decisions are taken by majority vote although with at least three votes in favor. There are cases in which the presence of all five members might be required.

The media sector finds representation in the framework of this regulatory body through its presence in the Consultative Council, an advisory organ that assists the Regulatory Council in the definition of its regulatory guidelines for its activity. It comprises representatives from various public and private entities which fall in the media area, namely the telecommunications regulator and the Journalist’s Union. It meets twice a year and there is the possibility of extraordinary meetings when convened by its President or at the request of a third of its members. Seeing that the state General Directorate for Consumer Affairs is also represented in the Consultative Council, civil society can be seen to be somehow present in the ERC’s structure. These members are elected by competent bodies of the represented organs in the Council for a period of three years, with replacements possible at any time.

Most of the daily activities carried out by the regulatory body are completed by four units dedicated to specific matters. The focus of the Supervision Unit is mainly on radio and television and it is responsible for the completion of tasks such as the verification of compliance with advertising schedules when spots are broadcast, with quotas of television independent productions or with quotas of Portuguese music broadcast in radio, amongst others. The Registration Unit is the one responsible for the record-keeping of media operators, that is to say it has to deal with the registration of journalistic companies and with the verification of the reliability and correspondence of written information and data provided by media operators with what really occurs. Daily information is, on the other hand, an issue under the sphere of competences of the Monitoring and Statistics Unit. It works with

¹⁹ Information available in the Portuguese table developed by Joaquim Fidalgo within the framework of the research project called INDIREG - “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive”, a partnership between the Hans Bredow Institute for Media Research, the ICRI (K.U. Leuven), the CEU/CMCS (Central European University, Budapest) and the Cullen International [http://www.cullen-international.com/cullen/cipublic/studies/Independence_media_regulators/Indicators_independence_efficient_functioning_AVMS_reg_bodies.htm, accessed 20.02.2012].

information in a systematic and on a daily basis, having as its main objective the verification of diversity and rigor, not only on television but also in radio and in the press. For example, when reports on political pluralism (in public service TV broadcasts) are being prepared, this unit is one of the main actors involved in the task. Finally, the Media Analysis and Polls Unit deals mainly with single cases for deeper analysis and with polls. In the first situation, the origin of the analysis of a certain issue can be a complaint or a decision by the Regulatory Council, when members consider that a more complex analysis is pertinent but this department also works systematically for annual reports or for special research projects (including, for instance, questions as regional press or the journalistic coverage of electoral campaigns). Regarding polls, their work is developed before their publication (in order to verify compliance with legal requirements) but also when complaints about polls or their content take place.

7. FUNDING

The ERC's funding derives mainly from state budget, industry fees and fines (which result from the imposition of penalties).

Although there is no direct source of income from spectrum fees, there is an amount transferred from the telecommunications regulator ANACOM to the ERC, whose financing derives primarily from these types of fees. In 2010, this contribution amounted to 812.686,00 Euros.

According to the ERC's annual report on finances and activity dated 2010 (the latest available), the total amount of income was: 1.059.028,75 Euros from regulation and supervision fees (legally²⁰ defined for all media operators, namely press, radio, open TV, cable TV and mobile communications, based on criteria of scope and dimension of each operator, which establish the distinction between tax of "high regulation", of "medium regulation" and of "low regulation"); 418.978,00 Euros from the attribution of titles enabling emission; 62.000,00 Euros from fines; 812.686,00 Euros from ANACOM; and 2.340.178,00 Euros transferred from the Assembly of the Republic.

The ERC is legally obliged to annually deliver to the Assembly of the Republic, by March, 31 of each year, a report on its regulatory activities as well as a report on activities and finances. The ERC sends the report to the Portuguese Assembly for its discussion, which also takes place at a hearing in the Parliamentary Commission on Constitutional Matters and Rights, Liberties and Guaranties (article 73, no. 2 of Law 53/2005). The document is then publicly available on the ERC's website.

8. REGULATION IN CONTEXT

In Portugal, there are 42 linear commercial TV channels and two main non-linear commercial services for video on demand, namely "Meo/Portugal Telecom" and "Zon / TV Cabo".

²⁰ Decree-Law no. 103/2006 (7 June), amended by the Decree-Law no. 70/2009 (31 March), on regulation and supervision taxes. Available online at <http://dre.pt/pdf1sdip/2009/03/06300/0194901961.pdf> [accessed 27.03.2012].

There is public service broadcasting²¹: two national open-access channels (RTP1 and RTP2) and 7 smaller channels (RTP Madeira, RTP Açores, RTP Internacional, RTP África, RTPN, RTP Memória and RTP Mobile). There are some recent debates regarding the future of PSB in Portugal, especially related to the alleged political intention (of the Government) of privatizing RTP as well as of closing RTP2. The two private broadcasters appeared in the 1990s. SIC (*Sociedade Independente de Comunicação*), which means Independent Communications Society, is led by the former Prime Minister Francisco Pinto Balsemão, while TVI (*Televisão Independente* – Independent Television) had close ties to the Catholic Church in its origin. Opening television broadcasting to private initiatives was the “most relevant media decision during Cavaco Silva’s mandates, and these two actors successfully lobbied to determine the outcome that best suited their interests” (Pinto & Sousa, 2004: 185)²².

Portugal has completed, last May 2012, the process of transition to Digital Terrestrial Television (DTT). The Telecommunications Regulator, ANACOM, was the body in charge of, as stated in its website²³, assuring that “the population took timely precautions in order to continue receiving television signals, in digital format only, considering the switch-off”. Recently, there has been a serious debate on this subject since a PhD thesis²⁴ has concluded that ANACOM has favoured Portugal Telecommunications (PT) and there is evidence towards regulatory capture by the regulated, leading to several (re)actions (namely threats of lawsuits) and also to the promotion of a public petition for academic freedom²⁵.

There are about 400 local radio stations and “national and regional stations’ ownership of which is concentrated in the hands of the state and Portuguese media groups” (Correia & Martins, 2007: 270), with Catholic Renascença Group leading.

In the press field, there are four main media groups controlling media property in the print media (namely, *Impresa*, *Media Capital*, *Cofina* and *Controlinveste*) and the number of regional newspapers, mostly weekly, is high: around 600 local and regional newspapers, a sector where the “Church is, directly or indirectly, the main owner” (Correia & Martins, 2007: 265)²⁶.

Regarding Internet, there were 1.4 million of users by the end of 2005 and “11.1 million subscribers of mobile phone service” (Correia & Martins, 2007: 271).

²¹ See <http://www.rtp.pt/homepage/> [accessed 30.06.2012].

²² Pinto, M. & Sousa, H. (2004) “Portugal”, in Kelly, M., Mazzoleni, G. & McQuail, D. (eds.) *The Media in Europe – The Euromedia Handbook*. London: Sage, pp. 180-190.

²³ Information on the DTT transition process at <http://www.anacom.pt/render.jsp?categoryId=344204> [accessed 15.11.2012].

²⁴ Available online at http://www.lasics.uminho.pt/ojs/index.php/TDT_Portugal/ [accessed 01.12.2012].

²⁵ Available online at <http://www.peticaopublica.com/?pi=P2012N31407> [accessed 01.12.2012].

²⁶ Correia, F. & Martins, C. (2007) “The Portuguese Media Landscape”, in Terzis, G. (ed.) *European Media Governance – National and Regional Dimensions*. Bristol: Intellect, pp. 263-276.