LOYALTY CLAUSES IN THE TELECOMMUNICATIONS SECTOR: PORTUGUESE COMPETITION AUTHORITY ADOPTS CRITICAL REPORT AND RECOMMENDATIONS DESPITE QUESTIONABLE EVIDENCE

In a trend not devoid of populist undertones, consumer contract terms in the telecommunications sector are becoming somewhat of a regulatory fetish in Portugal even though end-users benefit from some of the best network investment and service quality levels in the EU and from highly competitive retail offers.

Revisiting a 2010 study on consumer mobility, the Portuguese Competition Authority ("AdC") has recently reviewed consumer service contract terms in the telecommunications sector, in particular loyalty clauses and minimum contract durations, and published a report on the topic entitled "Loyalty policies in telecommunication services" (original version available on the AdC's website here). The report is critical of electronic communications service providers in Portugal for allegedly limiting the freedom of end-users to switch providers by associating certain retail offers with minimum contract terms under loyalty commitments.

In its report, the AdC identifies three main concerns regarding the telecoms sector in Portugal. First, it claims retail prices in Portuguese telecommunications service markets are higher than the EU average. Secondly, it claims consumer mobility is low, arguing that 53% of Portuguese consumers have never changed provider (based on 2018 data) and that half of those who did change faced difficulties in the process. Finally, the AdC mentions what it considers to be a high level of consumer complaints to the main consumer protection association DECO, adding that consumers identified this sector as "*the least competitive*" in 2018. In addition, the report highlights that 72% of contracts for landline services stipulate a minimum duration period ranging from 18 to 24 months (the latter being the maximum allowed by law).

These conclusions, however, sit uncomfortably with some of the extensive evidence that was brought to the AdC's attention during the public consultation on a draft version of the report, which took place in December 2019. In that consultation, the methodology and sources relied on by the AdC for its retail price comparisons drew heavy criticism from players in the telecoms sector who suggested that average revenues per user (ARPU) and overall user numbers paint a rather different picture. Indeed, between 2012 and 2018, ARPU in the telecoms sector in Portugal fell by 29%, while overall service usage between 2009 and 2018, as measured by revenue-generating units, increased by more than 22%. Despite this constant trend towards lower revenue levels in an expanding market, Telco service offers were repeatedly improved during the relevant period, with significant bandwidth upgrades in internet access services and regular enhancements to pay-tv contents on offer. As for the alleged limitations to customer switching, these are apparently contradicted by several indicators, notably a very high volume of number portability requests (4.7 million porting requests processed by end-2019) and the fact that the consumer complaints identified by the AdC do not explicitly mention contract duration periods or loyalty commitments as their grounds.

In this matter the AdC is clearly at odds with the opinion of Portuguese telecommunications service providers and, in some respects, appears to deviate from the evidence available.

Nevertheless, the report adopts a number of recommendations addressed both to the legislature and to the sector-specific regulator, ANACOM.

Recommendations for legislative measures, such as amending the Electronic Communications Law (notably Article 48, governing compulsory contract terms), include the following:

- Ensuring that loyalty commitments (*i.e.* minimum contract terms not exceeding 24 months) may only be renewed when: *(i)* new subsidized equipment or handsets are made available; or *(ii)* when new services are installed. Other than these two exceptions, other contract amendments (*e.g.*, awarding promotions, discounts or premium channel viewing or providing bandwidth upgrades) should not trigger contract duration commitments;
- Ensuring that consumers always receive information, and are asked for their written consent, in the case of distance contracts even if these are established following an initial call by the consumer (this situation is currently exempted);

- Making explicit provision in the law to situations where a consumer's change of address should be considered a material change to the contract's initial circumstances, preventing any early termination charges by the service provider if the consumer opts to terminate its contract;
- To introduce a rule that service providers must ensure that the means and formalities made available for consumers to subscribe to service offers should be equally available for when they choose to terminate their contracts (equivalent treatment principle).

In addition to the above, the AdC also recommends that the European Electronic Communications Code be implemented into Portuguese law in the shortest delay possible.

As for the recommendations addressed to ANACOM, the report singles out three measures for suggested implementation by this regulatory authority:

- To assess, for each service offer, what is the minimum contract duration necessary for a service provider to recover its investments in activating the services and subsidizing equipment;
- To enact rules enhancing transparency and information to consumers regarding the costs associated to early termination of their contracts;
- To carry out a cost-benefit analysis on the implementation of a customer migration procedure enabling the consumer to interact only with its new chosen service provider.

One may legitimately question whether the sector-specific regulator would have the means to perform the complex assessments and rulemaking exercises the AdC has mapped out without undue delays or excessively complex procedures.

As a general comment, given the intensely competitive nature of Portuguese electronic communications markets, the recommendations above seem focused on addressing largely nonexistent problems. Not only are they likely to incentivize some degree of regulatory overreach, it also seems uncertain whether they will be apt to produce net benefits for Portuguese consumers.

It remains to be seen what kind of practical implementation will be made of the recommendations above but, so far, this report by the AdC comes across as more of a virtue-signaling exercise than an effective contribution for solving any actual consumer protection issues in the telecommunications sector.

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