EUROPEAN COMMISSION

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Autoridade Nacional de
Comunicaçoes (ANACOM)
Avenida José Malhoa No. 12
1099-017 Lisboa
Portugal

For the attention of
Ms Fatima Barros
Chairperson

Fax: +351 21 721 10 02

Dear Ms Barros,

Subject: **Commission Decision concerning Case PT/2016/1932 - Wholesale call termination on individual public telephone networks provided at a fixed location in Portugal**

Comments pursuant to Article 7(3) of Directive 2002/21/EC

1. PROCEDURE

On 28 October 2016, the Commission registered a notification from the Portuguese national regulatory authority, *Autoridade Nacional de Comunicaçoes* (ANACOM)[1], concerning the market for wholesale call termination on individual public telephone networks provided at a fixed location[2] in Portugal.

The national consultation[3] ran from 31 May 2016 to 13 July 2016.

1 Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

2 Corresponding to market 1 in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

3 In accordance with Article 6 of the Framework Directive.

On 14 November 2016, a request for information[4] was sent to ANACOM. An additional question was sent on 16 November 2016. ANACOM's response was received on 17 November 2016.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The relevant termination markets were previously notified and assessed by the Commission under case PT/2013/1491. ANACOM indicated that each of the notified product markets comprised the termination services of a single network operator. The relevant market transactions covered were the fixed voice call termination services, provided at different network levels, independently of the transport and interconnection interface used. The market also included certain types of VoIP[5] and homezone services. ANACOM identified 18 operators with significant market power (SMP) and proposed to impose on them the obligations of access, non-discrimination, transparency, price control, accounting separation and cost accounting. The access obligation was not imposed with regard to IP interconnection. As to price control, since the Bottom-Up Long-Run Incremental Cost (BU-LRIC) model was not ready yet, ANACOM proposed (i) to apply as of 1 October 2013 fixed termination rates (FTRs) of 0.1114 €c/minute based on a benchmark against "pure" LRIC prices in other Member States, and (ii) to impose BU-LRIC based FTRs from 1 July 2014.

The Commission issued a "serious doubts letter", and opened a Phase II investigation on the basis of Article 7a of the Framework Directive. The Commission took the view that the non-imposition of an access obligation for IP interconnection was not technologically neutral, as provided for in Article 8(1) of the Framework Directive, and was not conducive to ensuring that there was no distortion or restriction of competition in wholesale markets for voice call termination at fixed location, as required under Article 8(2) (b) of the same directive. Furthermore, the Commission requested ANACOM to implement the pure BU-LRIC FTRs based on benchmarking as soon as practically possible by adopting provisional measures in accordance with Article 7(9) of the Framework Directive, to avoid any further delay. Finally, ANACOM was asked to comply in the future with the 3 year period for a market review.

4 In accordance with Article 5(2) of the Framework Directive.

5 Not including VoIP, i.e. Skype, Google Voice and similar services.

On 14 August 2013, ANACOM withdrew its draft measure before the end of the Phase II investigation period. On 27 August 2013, ANACOM informed the Commission of the provisional measures according to which termination rates were set on the basis of a benchmark in line with ANACOM's proposal in case PT/2013/1491. The benchmarking value of 0.1114 €c/min was an average termination rate on the basis of which rates for local, regional and national level termination have been calculated according to the volume of traffic terminated at each level. The resulting rates were: 0.1411 €c/minute for simple transit (regional level), 0.1026 €c/minute for termination at the local level, and 0.1642 €c/minute for interconnection at the double transit (national) level.

Against this background, the current regulation in Portugal is based on the market definition and SMP findings of 2004[6]. At the time, ANACOM designated the Portugal Telecom (PT) Group (now MEO) and 7 alternative network operators[7] (ANOs) as having SMP in their respective markets corresponding to each fixed operator's network. ANACOM imposed asymmetric remedies on the SMP operators. Whereas PT was subject to the same set of obligations as in the call origination market, ANOs were only subject to the obligations to provide access and to charge fair and reasonable prices[8]. In its comments letter, the Commission invited ANACOM to closely monitor the development of the cost structures of the operators on which the obligation to charge fair and reasonable prices was imposed and to assess whether its assumptions on fair and reasonable prices at the time of the market analysis would remain relevant over the period of the market review[9].

The weighted average cost of capital (WACC) for 2016 was notified under case PT/2016/1900[10]. ANACOM estimated a WACC value of 8.7304% for the fiscal year 2016. The Commission issued a "no comments" letter.

2.2. Market definition

ANACOM indicates that each of the notified product markets comprises the termination services of a single network operator. The relevant market covers the fixed voice call termination services, provided at different network levels, independently of the transport and interconnection interface used. The market also

6 The first round review of the market was previously notified to and assessed by the Commission under case PT/2004/0060-0061, SG-Greffe (2004)D/202508, as regards market definition and market analysis, as well as case PT/2004/0092, SG-Greffe (2004)D/203936, regarding the imposition of remedies. At the time, ANACOM opted for a two-phase review, which meant that it initially notified only the market definition and the SMP assessment and later on the remedies.

7 Cabovisão, Coltel, Jazztel, Novis Telecom, OniTelecom, Refer Telecom and Vodafone Telecel.

8 ANACOM argued that the imposition of cost-orientation on SMP operators other than PT would not be proportionate due to the asymmetry between the dimension of PT's network and other networks, the different scales of production, the different timing of market entry, and the discrepancy of termination prices. ANACOM indicated that the maximum difference between PT's and other operators' termination prices should not exceed 20%.

9 In 2010, ANACOM notified an amendment of remedies (PT/2010/1077-1078), which was used to set new price levels for call origination and for call termination. ANACOM also added that it intended to start developing and implementing a BU-LRIC model in the course of 2011.

10 C(2015) 5783 final.

includes the provision of VoIP (fixed or nomadic) termination services[11] and the fixed phone call services provided over GSM/UMTS frequency (the so-called "homezone" services)[12].

The relevant geographic markets are national in scope.

2.3. Finding of significant market power

ANACOM identifies 18 operators as having SMP[13] on their relevant termination markets. ANACOM based its SMP finding on an analysis of the following criteria: markets shares, price trends and pricing behaviour, barriers to entry and countervailing buyer power.

As a result of the methodological changes outlined above, ANACOM estimates a WACC value of 8.7304% for the fiscal year 2016.

2.4. Regulatory obligations

ANACOM proposes to impose on all SMP operators the obligations of access (both TDM and IP), transparency[14], non-discrimination and price control. The non-discrimination and price control obligations are not applicable to calls originated outside the European Economic Area (EEA).

In particular, as part of the obligation of access, ANACOM proposes to oblige MEO to submit a proposal for IP interconnection architecture within 4 months following the publication of the final measure[15].

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11 Not including Skype-to-Skype.

12 The "homezone" services are offers allowing access to the public telephone network from a fixed location, based on GSM and UMTS technology and network.

13 AR TELECOM – Acessos e Redes de Telecomunicações, S.A.; CABOVISÃO – Sociedade de Televisão por Cabo, S.A.; Compatel, Limited; COLT TECHNOLOGY SERVICES – Unipessoal, Lda; Dialoga – Servícios Interactivos, S.A.; G9SA – Telecom, S.A.; IP Telecom, Serviços de Telecomunicações, S.A.; MEO – Serviços de Comunicações e Multimédia, S.A. NOS Açores Comunicações S.A.; NOS Comunicações, S.A.; NOS Madeira Comunicações, S.A.; ONITELECOM – Infocomunicações, S.A.; ORANGE BUSINESS PORTUGAL, S.A.; OVHHOSTING – Sistemas Informáticos Unipessoal, Lda; VODAFONE PORTUGAL – Comunicações Pessoais, S.A.; VOIP-IT, Lda; VOIPUNIFY TELECOM, Lda; VOXBONE, S.A.

14 This obligation includes for the incumbent MEO the requirement to publish a reference offer.

15 ANACOM further envisages organising a meeting with all concerned operators within 2 months after the adoption of the final measure. During this meeting, MEO shall present the guidelines of its proposal in order to give alternative operators the opportunity to present their suggestions and concerns, which have to be taken into account in the final proposal for IP interconnection. MEO's proposal should be then assessed by ANACOM in coordination with all market operators.

The price control obligation implies the imposition of price-caps calculated on the basis of a pure BU-LRIC model. The resulting level is of 0.0644 €c/minute. It applies for termination at the local and the single transit (regional) levels. As to the rate applicable at the double transit (national) level, ANACOM proposes to leave it to commercial negotiations[16]. In the absence of a commercial agreement, the rates should not exceed 0.1642 €c/minute[17].

ANACOM models an existing hypothetical operator[18] whose network roll-out starts in 2009, is commercially launched in 2010, and whose core network is IP-based. ANACOM specifies that the transition from TDM to IP is assumed in the model to start in 2015 in order to be achieved by 2019 (when interconnection would be fully IP-based). The model provides tariffs for 2012 which ANACOM adjusts for inflation to obtain the currently proposed BU-LRIC price-caps. The WACC used corresponds to the 2014 value of 10.42% (9.33% in real terms). ANACOM explains in the response to the request for information that they find it speculative to model WACC in the longer term (i.e. BU-LRIC modelling exercise). The WACC value would thus be reviewed in the context of the next update of the model.

3. COMMENTS

The Commission has examined the notification and the additional information provided by ANACOM and has the following comments:

Delineation between the transit and the fixed voice call termination markets

ANACOM proposes to include the termination of calls at the double transit (national) level in the relevant termination markets. The termination service at this level would be price-regulated in case a commercial agreement among operators cannot be reached.

It is the Commission's understanding that in Portugal several operators compete on the double transit market segment. The inclusion of double transit termination in the relevant termination markets and setting of a price cap could therefore impede the provision of transit services by alternative operators on a market which ANACOM declared competitive in 2005[19].

16 In its reply to the first Commission's request for information, ANACOM indicated that the traffic terminated at the double transit level of interconnection amounts to [...]% of MEO's terminated traffic.

17 0.1642 €c/minute corresponds to the rate that MEO currently charges for terminating a call at the double transit level.

18 The efficient operator would reach the efficient minimum scale five years after market entry.

19 See case PT/2005/0154 (SG-Greffe(2005)D/201587)

In its 2005 review of the transit market ANACOM does in fact include the conveyance of calls on a merchant basis from one exchange to another (regardless of the type). Thus, ANACOM's proposal to set price caps for termination at national level leads, *prima facie*, to the regulation of a market segment which is competitive. However, the Commission notes that even if double transit termination is included in the definition of the relevant termination market and subsequently price regulated at the currently proposed level, this may have no or a very limited regulatory impact. Given the presence of transit operators at the national point of interconnection, which could convey traffic to the regional level, the Commission considers it unlikely that commercial agreements fail in this competitive market segment. This would in turn imply that commercial rates would prevail and the proposed safety cap of 0.1642 €c/minute, which is almost three times higher than the BU-LRIC rate, would *de facto* not apply. Moreover, according to ANACOM, only [...]% of the whole traffic is terminated at national (double transit) level, which will in any case be much further reduced once IP interconnection has been fully implemented.

The Commission therefore decided not to challenge the currently notified market definitions, as it believes that the incorrect delineation between termination and transit would have no or a very limited effect on the regulatory outcome of the presently notified draft measures.

Against this background, the Commission urges ANACOM to review the definition of the wholesale fixed call termination markets as soon as possible and to set an exact demarcation point between termination and transit markets, in recognition of the state of competition on transit routes beyond the regional/local point of interconnection. In the meantime, the Commission urges ANACOM to lift in its final measure the safety caps imposed on tariffs for termination at national level.

Need to update the BU-LRIC model

The Commission notes that the BU-LRIC model used by ANACOM to set fixed termination rates is based on 2012 data. Also, the WACC value used dates back to 2014. The use of outdated figures conveys the risk of imposing regulatory measures which do not correctly reflect the efficient costs incurred for the provision of the relevant service. Therefore, the Commission calls upon ANACOM to update its cost model without undue delay with a view to ensuring that fixed termination rates in Portugal are forward-looking and set on the basis of the most recent data available.

Pursuant to Article 7(7) of the Framework Directive, ANACOM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures. Pursuant to Point 15 of Recommendation 2008/850/EC[20] the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[21] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.[22] You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

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20 Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

21 Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

22 The Commission may inform the public of the result of its assessment before the end of this three-day period.