

DECISION

ON THE CONCEPT OF UNFAIR BURDEN

**IN THE PROVISION OF BROADBAND INTERNET ACCESS SERVICES, UNDER
PARAGRAPH 5 OF ARTICLE 6 OF DECREE-LAW NO 66/2021,
OF 30 JULY**

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Contents

1. Scope and legal background	1
2. Characteristics of the tariff affordability measure	2
3. Concept of unfair burden	6
3.1. Concept of unfair burden applied to former features of the US	6
3.2. Assessment of loss or net cost exceeding normal commercial standards	8
3.2.1. Assumptions for assessing an unfair burden	8
3.2.2. Impact on the financial or competitive situation of the company	9
3.2.3. Summary	12
3.3. Experiences in other countries	13
4. Conclusion and determination	15

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1. Scope and legal background

Decree-Law No 66/2021, of 30 July¹, establishes the social tariff for provision of fixed or mobile broadband Internet access services (hereinafter «social tariff for broadband Internet access»), which all companies that provide this type of service are required to make available, and which applies to consumers on low incomes or with special social needs, considered as such under article 4 of the same law.

A tariff affordability measure is thus established, which this law places within the scope of the universal service for electronic communications (US), given the model and objectives underlying this intervention and the financing model determined therein².

Paragraph 5 of article 6 of Decree-Law No 66/2021 establishes that it is incumbent on ANACOM to define the concept of «*unfair burden*» (which, where it exists, determines the calculation of the net cost incurred with the provision of the broadband Internet access service set out in this law), as well as the terms governing its calculation, namely how often assessments are made and which criteria are used.

With that purpose in mind, ANACOM's Board of Directors approved, on 12.08.2021³, the draft decision (DD) on the concept of unfair burden, specifying the conditions under which compliance with the obligations required to make available the social tariff for broadband internet access may constitute an unfair burden.

The DD was submitted to a prior hearing procedure, pursuant to articles 121 and 122 of the Administrative Procedure Code (APC) and to the general consultation procedure set out in article 8 of the Electronic Communications Law (Law No 5/2004 of 10 February 2004, in its current wording), in accordance with paragraph 1 of article 11 of the Statutes, approved by Decree-Law No 39/2015, of 16 March, both for a period of twenty working days.

ANACOM received timely replies from FastFiber - Infraestruturas de Comunicação, S.A., Fibroglobal - Comunicações Electrónicas, S.A., Gardunha Networks, Lda., MEO - Serviços de Comunicações e Multimédia, S.A., NOS, SGPS, S.A., on behalf of its subsidiaries NOS Comunicações, S.A., NOS Açores Comunicações, S.A. and NOS Madeira Comunicações,

¹ Decree-Law No 66/2021, of 30 July 1, which establishes the social tariff for provision of broadband Internet access services; available at <https://dre.pt/web/guest/home/-/dre/168697989/details/maximized>.

² Special reference is made in article 6 of the Decree-Law to Part A of Annex VII to Directive (EU) 2018/1972 of the European Parliament and of the Council, of 11 December 2018, establishing the European Electronic Communications Code (EECC).

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Available at: https://www.anacom.pt/streaming/SPDEncargoExcessivodec12082021.pdf?contentId=1695372&field=ATTACHED_FILE

S.A., NOWO - Communications, S.A. and SUMAMOVIL Portugal, S.A. Contributions were also received within the deadline from 3 citizens, from the consumer association Ius Omnibus, and also from APRITEL.

After analysing the comments, a report on the prior hearing and public consultation procedures was prepared, which contains a summary of contributions received and the Regulatory Authority's positions in this regard. The report is an integral part of this decision.

2. Characteristics of the tariff affordability measure

The social tariff for broadband Internet access corresponds to an amount due by consumers on low incomes or with special social needs as consideration for the provision of a broadband Internet access service; the service is made available via fixed or mobile broadband, whenever there is an installed infrastructure and/or mobile coverage that allows this provision.

Under paragraph 1 of article 3 of Decree-Law No 66/2021, the service to be made available must support the following minimum set of services:

- a) Electronic mail;
- b) Search engines, which should make it possible to search and consult all types of information;
- c) Basic online training and educational tools;
- d) Online newspapers or news;
- e) Buying or ordering goods or services online;
- f) Job search and job search tools;
- g) Professional networking;
- h) Internet banking;
- i) Use of e-Government services;
- j) Use of social networks and instant messaging;
- k) Calls and video calls (with standard quality).

Article 4 of the same Decree-Law defines the range of potential beneficiaries of the social tariff for broadband Internet access - consumers on low incomes or with special social needs - which corresponds to natural persons in the following situations:

- a) Beneficiaries of the senior citizens pension supplement;
- b) Beneficiaries of the income support supplement;
- c) Beneficiaries of unemployment benefits;
- d) Beneficiaries of family benefits;
- e) Beneficiaries of the disability pension of the special invalidity protection regime or of the social benefit supplement for inclusion purposes;
- f) Households with an annual income equal to or less than EUR 5 808.00, increased by 50%, for each member of the household with no income, including their own, up to a limit of 10 persons⁴; and,
- g) Beneficiaries of old-age pension.

The referred Decree-Law also establishes that university students who are part of households in the situation described in point f) of paragraph 1 of article 4 of the same law (referred to above) and who travel to other municipalities in the country to study, may also benefit from the social tariff for broadband Internet access (cf. paragraph 2 of article 8 of Decree-Law No 66/2021).

It is furthermore set out that the social tariff for broadband Internet access is awarded following a request from the interested party to companies providing broadband Internet access services, whose eligibility is assessed by ANACOM (cf. paragraphs 1 and 2 of article 9 of Decree-Law No 66/2021).

The criteria for determining the range of beneficiaries of the social tariff for broadband Internet access are similar to those that currently apply for the electricity social tariff⁵.

According to information published by the Directorate General for Energy and Geology (DGEG), in June 2021, this number totalled 797 112 beneficiaries (for mainland Portugal)⁶. With regard to the Autonomous Regions of the Azores and Madeira, the Energy Services Regulatory Authority (ERSE) indicated that, for 2020, the number of beneficiaries would be

⁴ For the purpose of point f), the calculation of the annual income is carried out under paragraph 2 of article 3 of Administrative Rule No 311-D/2011, of 27 December, as it stands, whereby household is considered, each year, to be a set of persons as defined in article 13 of the Personal Income Tax Code, approved by Decree-Law No 442-A/88, of 30 November, as it stands.

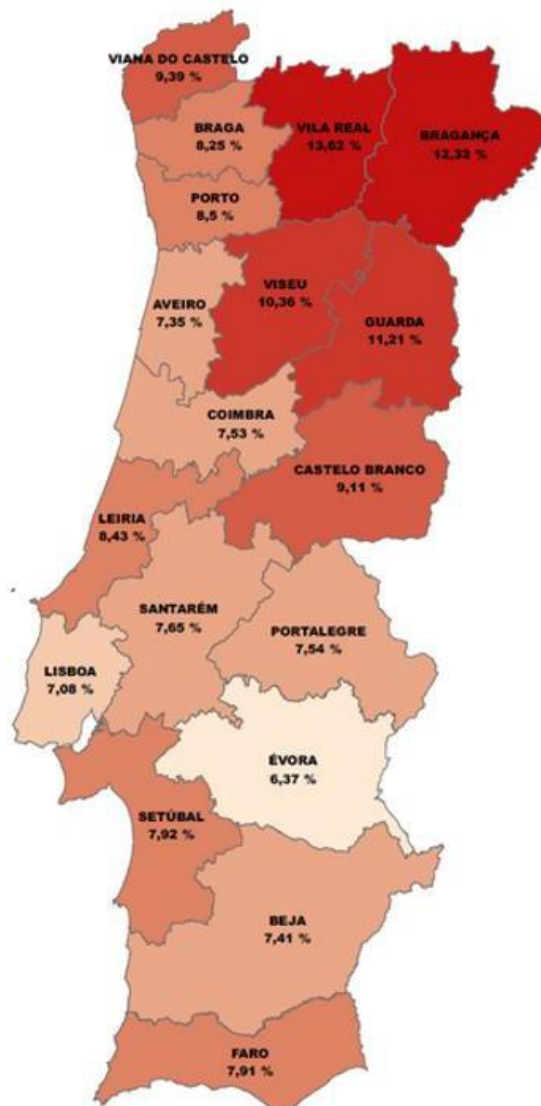
⁵ Information on this matter available at <https://tarifasocial.dgeg.gov.pt/perguntas-frequentes-energia-eletrica.aspx?v=b0c6b8df-e083-427b-985f-c0a6fea87918>.

⁶ Information available at <https://tarifasocial.dgeg.gov.pt/estatistica.aspx>.

around 19.000 and 23.000⁷ respectively. Overall, this involves around 840.000 people.

The following figure presents information on the geographical spread of the range of beneficiaries of the electricity social tariff (in mainland Portugal), and there are no reasons for this spread to be different from the range of potential beneficiaries of the broadband Internet access social tariff⁸.

Figure 1 - Geographical spread of beneficiaries of the electricity social tariff in mainland Portugal - percentage of beneficiaries compared to the average population of each district, June 2021



Source: DGEE; INE (average annual resident population per district, 2020)⁹

As shown in the figure above, the beneficiaries of the electricity social tariff, as far as Mainland

⁷ According to information published by ERSE at <https://www.erse.pt/media/21ml02qq/parecer-alargamento-tarifa-social.pdf> (pg.3).

⁸ Information available at <https://tarifasocial.dgeg.gov.pt/estatistica.aspx>.

⁹ Information available at <https://tarifasocial.dgeg.gov.pt/estatistica.aspx>.

Portugal is concerned, are spread throughout the whole territory, and it is noted that in the northern interior of the country the proportion of beneficiaries of the tariff is relatively greater compared to the population of that region.

On the basis of this information and considering the referred parallelism between beneficiaries of the electricity social tariff and the broadband Internet access service, this Authority expects that the adoption of this measure will not have a local impact, and that, a priori, the beneficiaries of the broadband Internet access social tariff will be spread throughout the various areas of the territory.

This will help reduce the impact that a high concentration of beneficiaries in specific geographical areas could have, namely in terms of possible congestion of existing networks, which could, ultimately, lead to the need for additional investment by publicly available electronic communications network operators in order to accommodate additional users on their networks and continue to provide services at the same level of performance¹⁰.

The number of beneficiaries of the social tariff for broadband Internet access has also not been defined, as there may be various situations of potential beneficiaries who, due to lack of interest, or because they have already subscribed alternative offers, even in association with other services, will not apply for the social tariff.

In view of the above, it is expected, as far as the scope of the measure is concerned, that potential beneficiaries will be geographically spread and their number may be relatively lower than the potential range.

3. Concept of unfair burden

3.1. Concept of unfair burden applied to former features of the US

In the decision of 09.06.2011¹¹ ANACOM considered that an unfair burden existed from the moment the universal service provider (USP) ceased to have market conditions to internalise the net costs of the universal service (USNC).

ANACOM deemed it relevant, for increased consistency and justification of the definition of the concept of unfair burden, to densify this concept taking into account other specific aspects of the situation of the company that provided the US, as stated by the Court of Justice of the European Union in its Judgement on infringement proceedings brought by the European

¹⁰ The availability, reliability and resilience of electronic communications networks and services during the SARS-COV-2 pandemic is worth noting.

¹¹ Available at <https://www.anacom.pt/render.jsp?categoryId=341749>.

Commission (EC) against the Kingdom of Belgium.

In this Judgement, the Court of Justice defined unfair burden as “(..) *a burden which, for each undertaking concerned, is excessive in view of the undertaking’s ability to bear it, account being taken of all the undertaking’s own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share.*” According to the Court, “*it falls to the National Regulatory Authority to lay down general and objective criteria which make it possible to determine the thresholds beyond which – taking account of the characteristics mentioned in the preceding paragraph – a burden may be regarded as unfair (...)*”¹².

As far as the US provision is concerned, in a context where the designation of the USP was not the result of a competitive tendering procedure, an unfair burden was determined to exist where the market share in terms of revenues of the USP fixed telephone service (FTS), calculated on an annual basis, was less than 80%.

In 2012, ANACOM determined that, in a context where the designation of USP had resulted from a tender procedure, the USNC that were eventually identified under that procedure would be considered to be an unfair burden¹³.

The Decree-Law that establishes the social tariff for the provision of broadband internet access services entrusts ANACOM with the task of defining the concept of unfair burden which service providers may be subject to when applying this tariff (cf. paragraph 5 of article 6 of Decree-Law No 66/2021).

Bearing in mind that a potential burden may be incurred when, as in the case under consideration, a company is required to offer a service under conditions other than those it would offer under standard conditions (specifically with a regulated price and defined basic characteristics), it is therefore important in this context to assess whether or not such a burden is unfair, with due regard to costs and revenues, as well as the other benefits arising from the provision of the services in question.

For this purpose, it is deemed as essential to characterise the tariff affordability measure established by the referred Decree-Law, to have an idea of its coverage as far as beneficiaries and territorial spread are concerned, as well as to assess its potential cost and verify the extent to which the provision of the service against payment of the consideration provided herein -

¹² Cf. paragraphs 49 and 50 of the Judgment of the Court of Justice of the EU of 06.10.2010 in case C-222/08, available at <https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX:62008CJ0222>.

¹³ Determination of 07.02.2012, available at https://www.anacom.pt/streaming/DecisaoANACOM_consultaPSU.pdf?contentId=1116742&field=ATTACHED_FILE.

social tariff - represents a deviation from normal commercial standards, in order to conclude whether and under what terms its offer by companies that provide fixed or mobile broadband services may represent an unfair burden.

3.2. Assessment of loss or net cost exceeding normal commercial standards

3.2.1. Assumptions for assessing an unfair burden

Directive (EU) 2018/1972 of the European Parliament and of the Council, of 11 December 2018, establishing the European Electronic Communications Code (hereinafter EECC), determines that mechanisms for financing the net cost of universal service obligations should be established where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards.

In addition, it is also mentioned regarding the imposition of tariff affordability measures within the framework of the US that compensating companies for the provision of services concerned in such circumstances need not result in the distortion of competition, provided that such companies are compensated for the specific net cost involved and that the net cost burden is recovered in a competitively neutral way.

It is therefore important to determine whether the obligation to provide fixed or mobile broadband internet access service in compliance with the conditions laid down in Decree-Law No 66/2021 is likely to result in an unfair burden.

It should be noted that obligations related to the provision of broadband Internet access service, upon payment of the value established for the social tariff, corresponds to a tariff affordability measure and not to network availability, which naturally implies from the outset a less demanding burden for companies providing the services in question.

Assuming that USNC exist, the decision on whether the provision of the service represents an unfair burden for companies, under the terms provided for in the statutory instrument that approves the social tariff itself, will depend on the assessment of the financial impact of this provision and the capacity that companies have to internalise the costs with the provision of the offer, which depend, among other factors, on the number of potential beneficiaries that may subscribe to the offer and the conditions determined for the offer.

In this context, assuming the existence of USNC, it is believed that the provision of the service represents an unfair burden where it has any impact on the financial or competitive situation of the company providing the service.

3.2.2. Impact on the financial or competitive situation of the company

As the social tariff for broadband Internet access is a tariff affordability measure imposed on companies as an US obligation, it must be taken into account when assessing the existence of an unfair burden that companies would be unlikely to make this offer available or would not make it available under the conditions to be determined.

As such, if the provision of the social tariff results in a net cost (costs minus revenues adjusted according to any potential benefits), it is important to assess the impact of this cost for each company in order to assess whether it significantly affects its profitability and/or ability to obtain a fair return on invested capital. In fact, there will be situations in which net costs are low and the company may be able to internalise them, with no significant detriment to its profitability and competitiveness.

In this context, it is relevant to adopt a first criterion associated with the relative weight of USNC against a performance indicator of the US provider.

Thus, it is considered that the financial impact criterion to determine the level beyond which companies that provide the social broadband Internet access tariff find their capacity to endogenize USNC to have weakened, and thus consider that an unfair burden exists, should be based on the weight that USNC assume in revenues obtained from the provision of the social broadband Internet access tariff.

In this context, considering that it is appropriate for the purpose to define a relation between the amount of USNC and the USP's revenue obtained with the US, in order to assess whether an unfair burden exists, ANACOM believes that the relevant value for the purpose corresponds to 3%. Thus, an unfair burden shall be deemed to exist when the amount of USNC, verifiable and verified, is equal to or greater than 3% of the USP's revenues obtained with the provision of the social tariff.

It is worth noting that the value in question is similar to that established for the concept of an unfair financial burden (UFB) applied to the provision of the universal postal service¹⁴.

Other criteria could be used to assess the financial impact, notwithstanding the fact that establishing an objective and stable criterion for the definition of the concept of unfair burden has advantages in terms of objectivity, predictability and regulatory certainty. By way of

¹⁴ See in this regard ANACOM's decision of 29.04.2021 on the concept of unfair financial burden for the purpose of the compensation of the universal service net cost with respect to postal services, available at <https://www.anacom.pt/render.jsp?contentId=1624183>.

example, the following are some of the criteria used in the financial impact assessment:

- Changes in the return on USP assets.
- Changes in accounting profits and related metrics (ex. EBITDA).
- Changes in the net cost of US obligations over time.

Under the described conditions, it is deemed appropriate to consider that an unfair burden exists when, for a given company, the verifiable and verified net cost of providing the social broadband internet access tariff is equal to or greater than 3% of the revenues obtained with that service.

ANACOM also takes the view that, since the obligation to make available the social broadband Internet access tariff applies to all companies that provide fixed or mobile broadband Internet access services, the impact on their competitive situation may differ, an aspect that should be considered when determining whether an unfair burden exists.

As such, without prejudice to the analysis of the financial impact assessed by the first criterion, it is considered that a second criterion should be applied where the first is not fulfilled and the provider is able to demonstrate that its competitive capacity in the market was affected in a relevant way by making the social broadband Internet access tariff available. Accordingly, in cases in which USNC, verifiable and verified, are lower than the 3% threshold of revenues generated by the offer of the social tariff, where the company demonstrates that the provision of the social tariff for broadband Internet access generates a significant impact on competition, affecting its capacity to compete on equivalent terms to those of its competitors, ANACOM may take this situation into account, concluding that an unfair burden exists.

The following indicators must be considered when assessing the second criterion: the evolution of the provider's profitability indicators with its activity in the scope of electronic communications and related metrics (such as EBITDA and EBITDA margin); the evolution of the market share in the electronic communications sector; the evolution of prices charged in the market by the provider and competitors; the evolution of the ratio of IST clients and/or accesses to clients and/or accesses in the non-regulated market (for the purposes of applying the IST).

The analysis of these indicators, sustained by information made available by the interested party, will make it possible to measure the impact of the social tariff for broadband Internet access on the profitability and positioning of the company in the market, so that it can be concluded whether its ability to compete is affected with this provision, thereby creating

imbalances in its standing with regard to other competitors.

The obligation to make the social tariff for broadband internet access available, under the terms of Decree-Law No 66/2021, which applies to all companies providing fixed or mobile broadband internet access services, may have a differentiated impact on the competitive situation of companies, particularly when small-scale operations are at stake.

Notwithstanding the conclusion that it is relevant to take into account the impact on the competitive situation of the company, resulting from the obligation to make available the IST offer, in order to assess whether an unfair burden exists, this Authority considers that this second criterion will no longer apply in case the Government amends the IST regime by exempting smaller providers from the obligation to provide the IST, as ANACOM recommends.

This would ensure that the said providers are guaranteed a mechanism to protect their competitive capacity, which would make the application of the second criterion unnecessary, as it becomes no longer justified, and only the first criterion would remain applicable, for the purposes of determining the unfair burden.

Thus, it is recommended that the Government introduces an amendment to Decree-Law No 66/2021, providing for an exemption from the obligation to make available the social tariff for broadband Internet access services for companies that provide fixed or mobile broadband Internet access services, whose value of eligible turnover in the second year (year N - 2) prior to the year in which the exemption applies (year N), gives them a weight of less than 1% of the overall eligible turnover of the electronic communications sector, measured in accordance with Law No 35/2012 of 23 August (Fund Law). The use of the 1% threshold of the overall eligible turnover of the electronic communications sector is justified by the fact that this is the value that exempts companies from contributing to the universal service compensation fund.

3.2.3. Summary

Under the described conditions, ANACOM takes the view that the determination of the conditions under which compliance with the obligations related to the provision of the social tariff for broadband internet access is liable to become an unfair burden when USNC arising from the provision of this service have an impact on the financial or competitive situation of companies.

In this respect ANACOM considers that two criteria may be applied. Thus, the first criterion to apply determines that there is an unfair burden in the provision of the social broadband Internet access tariff where USNC arising from the provision of the broadband Internet access service

through the offer of the social tariff is equal to or greater than 3% of the revenue obtained from the provision of the social tariff. ANACOM may also find that an unfair burden exists even where the 3% limit is not met when, by applying the second criterion, it is shown that, as a result of the analysis of a set of indicators made available by the company providing the IST, there is a significant impact of USNC on the competitive situation of a particular company providing the social tariff for broadband internet access.

In these situations, ANACOM believes that, if an application for compensation is submitted, as established in Decree-Law No 66/2021, of 30 July, the respective compensation should be paid.

It is apparent from the public consultation and stakeholder hearing procedure that some of the respondents have expressed concerns about the impact this provision may have on a smaller operation, in particular one that has recently started. Acknowledging that some impact may take place and also bearing in mind the time lag between the time of provision and compensation, this Authority together with the present decision will recommend the Government to amend Decree Law No 66/2021, so as to allow for the possibility of exemption as set out in section 3.2.2.

3.3. Experiences in other countries

With the adoption of the EECC in December 2018, the essence of the US was changed to ensure that consumers have access, at an affordable price and in the light of specific national conditions, to an adequate and available broadband internet access service and voice communications services of specified quality, including the underlying connection, at a fixed location. The US may also include tariff affordability measures for such services, even at a non-fixed location, if deemed necessary to ensure the full social and economic participation of consumers in society.

In several countries, the provision of the US does not result in an unfair burden. Nevertheless, there are some decisions of EU Regulators, as in the cases of Spain and Ireland, which follow approaches equivalent to those analysed here, which are worth highlighting.

In Ireland, the Electronic Communications Regulator (ComReg) decided¹⁵, following a request for compensation for the net cost of universal service that the net cost incurred by the universal service provider was not an unfair burden given that, although it existed and was material, it

¹⁵ ComReg 11/42. Report on Consultation and Decision on the costing of universal service obligations: principles and methodologies. Available at: <https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/>.

did not significantly impact the return on invested capital.

ComReg believes that, although a burden may exist whenever an operator is required to offer, by imposition of external intervention (regulation, legislation), a service other than what it would offer in a competitive market, such a burden is only deemed to be unfair where, cumulatively: (i) there is a verifiable and verified net cost; (ii) the benefits arising from the provision of the US do not outweigh the cost less revenues; (iii) the net cost is material (i.e. comparatively higher than the administrative costs of a compensation mechanism); and (iv) that net cost causes a significant competitive disadvantage for the US provider.

More recently, in Spain, the Regulatory Authority (CNMC) approved a decision in 2021 on the USNC submitted by the US provider for 2018¹⁶, in which it concluded that an unfair burden existed for the period under review, basing its decision on three criteria: i) the amount of net costs of the US; ii) the financial impact of the net costs on the US provider; and iii) the competitive situation of the US provider.

Finally, it is also relevant to list the set of indicators related to market conditions and the degree of competition in the market, suggested by the European Regulators Group for Postal Services (ERGP) for analysis by Regulatory Authorities when defining the concept of UFB¹⁷, namely:

- financial position of the USP;
- if the positive net cost significantly affects a USP's profitability and ability to earn a fair rate of return on capital employed;
- changes in profitability (the burden is unfair if the USP's market power is not sufficient to counterbalance the weight of the US obligations to maintain a reasonable profit);
- significant difference in USP's profit compared with that of competing operators (the US provision imposes an UFB if the USP's profit is lower than its competitors);
- significant changes in financial ratios (for example EBITDA and margins);
- the level of use of postal services (the demand for postal services has been declining in recent years, which theoretically could reduce the revenue of USP, against a set of relatively high network costs). For this reason, the USP probably may face economic

¹⁶ Available at <https://www.cnmc.es/expedientes/sudtsa01220>.

¹⁷ See report ERGP (11) 17. Rev1 - Report on net cost calculation and evaluation of a reference scenario (pages 43 et seq.), available at <https://ec.europa.eu/docsroom/documents/14223/attachments/2/translations/en/renditions/native>.

difficulties;

- US cost and revenues, as well as the ratio between net cost and revenues;
- Market shares - in case that USP is able to maintain high market shares, USNC will not represent an UFB for the USP resulting from the US provision (in the European practice in the electronic communications sector, market shares in revenues above 80% are used in several countries to assess non-existence of unfair burden).

Notwithstanding, the situation of the universal postal service is relatively different from the one that exists in the electronic communications sector, not only in terms of market structure, but also because in the latter case, all providers in the market are required to ensure the service provision concerned. On the basis of these differences, it does not seem appropriate to apply some of the indicators mentioned to the concept of unfair burden associated with the provision of the social tariff for broadband internet access. For example, the use of market shares of revenues above a threshold is an appropriate indicator for situations where there is a single USP, but one which presents difficulties in a scenario where the provision is assured by a set of providers. Nevertheless, ANACOM will use the appropriate indicators to assess the possible existence of an unfair burden in these situations, as indicated above.

4. Conclusion and determination

Whereas:

- a) Decree-Law No 66/2021, of 30 July, establishes the social tariff for provision of fixed or mobile broadband Internet access services as a tariff affordability measure within the scope of the universal service, which applies to consumers on low incomes or with special social needs.
- b) The social tariff for broadband Internet access must be made available by all companies that provide this type of service.
- c) Under paragraph 1 and 5 of article 6 of the referred Decree-Law, it is incumbent on ANACOM to define the concept of “*unfair burden*” to which the application of the social tariff for broadband internet access refers, as well as the terms governing its calculation, namely how often assessments are made and which criteria are used.
- d) The new implementation of the concept of unfair burden arises from provisions of the

above-mentioned Decree-Law that creates the social tariff for broadband Internet access, which determines that ANACOM will decide on the matter.

- e) The social tariff corresponds to a tariff affordability measure and not to network availability, which naturally implies from the outset a less demanding burden for companies providing the services in question.
- f) The potential range of beneficiaries of the social tariff for broadband Internet access is around 800 000 people and will be spread throughout the country, although the number of actual beneficiaries may be lower than that.
- g) Several potential beneficiaries may currently be subscribed to fixed or mobile broadband service offers and not find it worthwhile to switch to the social tariff, thus the range of beneficiaries of the measure is estimated to be relatively smaller compared to the potential range.
- h) In situations where it is shown that US obligations can only be provided at a loss or with a net cost that exceeds normal commercial standards, net cost financing mechanisms must be established, as established by the EECC, to which reference is made in paragraph 1 of article 6 of Decree-Law No 66/2021.
- i) Under the assumption that there is a net cost, the existence of an unfair burden for companies providing the US depends on the financial impact of those costs, insofar as it exceeds a given threshold, above which it is considered that this impact is relevant and that it also compromises the competitive capacity of the companies, and on the impact on the competitive situation of those providers, even if the financial impact falls below the referred threshold (3%), which will mainly affect smaller operations.
- j) The known international experiences concerning the definition of the concept of unfair burden adopt criteria at financial and competition level that, if met, determine the existence of an unfair burden.
- k) Stakeholders' statements emphasise the importance of further densifying the criterion relating to the impact of the IST on the ability of the provider to compete in the market.
- l) Stakeholders' statements highlight the potential detrimental impacts that the obligation to provide the IST may have on a small operation, in particular one that has recently started.

The Board of Directors of ANACOM, carrying out the assignment set out in point i) of paragraph

1 of article 8 of ANACOM's Statutes, approved by Decree-Law No 39/2015, of 16 March, and in the exercise of the powers set out in paragraph 5 of article 6 of Decree-Law No 66/2021, of 30 July, hereby determines, pursuant to point q) of paragraph 1 of article 26 of its Statutes:

1. To decide that the provision of the broadband internet access service, in compliance with the requirements of Decree-Law No 66/2021, of 30 July, represents an unfair burden:
 - a) where the net cost arising from the provision of this service, verifiable and verified, is equal to or greater than 3% of the revenue obtained with this service; or
 - b) where the criterion of point a) above is not fulfilled and the service provider is able to demonstrate that its competitive capacity in the market has been affected in a relevant way, taking into account, in particular: the evolution of profitability indicators and related metrics, market share, prices charged by the provider and competitors and the ratio of IST customers/accesses to non-regulated market customers/accesses.
2. To determine that this evaluation is to be carried out on an annual basis.
3. To recommend that the Government consider exempting from the obligation to make available the social tariff for broadband Internet access services companies that provide fixed or mobile broadband Internet access services, whose value of eligible turnover in the second year (year N - 2) prior to the year in which the exemption applies (year N), gives them a weight of less than 1% of the overall eligible turnover of the electronic communications sector, measured in accordance with Law No 35/2012 of 23 August.
4. To decide that the criterion stipulated in point 1b) above ceases to apply should the legislative amendment required to provide for the exemption recommended in the previous paragraph be adopted.