

**DECISION ON THE DISPUTE BETWEEN DStelecom Norte, S.A. AND ASSOCIAÇÃO DE  
MUNICÍPIOS DA TERRA QUENTE TRANSMONTANA ON REMUNERATION FOR ACCESS TO  
INFRASTRUCTURE SUITABLE FOR THE ACCOMMODATION OF FIBRE OPTIC IN TERRA QUENTE  
TRANSMONTANA**

**I. Facts**

**a. Application presented by DStelecom Norte, S.A.**

1. By application<sup>1</sup> presented on 28.03.2013, DStelecom Norte, S.A. (hereinafter DST) requested, under article 10 of the Electronic Communications Law (Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September - ECL) and paragraph 3 of article 19 of Decree-Law No. 123/2009 of 21 May, as amended and republished by Decree-Law No. 258/2009<sup>2</sup>, of 25 September, and Law No. 47/2013, of 10 July<sup>3</sup> (hereinafter DL 123/2009), the intervention of ANACOM in the scope of its dispute with *Associação de Municípios da Terra Quente Transmontana* (hereinafter AMTQT).

In short, DST claims that:

On 08.05.2012, it applied to AMTQT for access to pipelines of the community broadband network held by that association (Community Broadband Network held by Terra Quente Transmontana, hereinafter CBNTQT) for the purpose of the deployment of fibre optic, for a minimum period of 20 years.

On 16.05.2012, DST was informed by letter<sup>4</sup> sent by AMTQT that the request for access had been approved.

In parallel with the approval of the request for access, AMTQT required, for the use of pipelines, *the payment of the following remuneration: €3,10/m in*

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<sup>1</sup> Registered with No. 2013046767.

<sup>2</sup> [Decree-Law no. 258/2009, of 25 September](#) .

<sup>3</sup> <http://www.dre.pt/pdf1s/2013/07/13100/0397304004.pdf>

<sup>4</sup> Letter AMTQT with reference 291, dated 16.05.2012.

*the backbone and €3,76/m in local networks, the full price for a minimum period of 20 years being due when pipelines are first used<sup>5</sup>.*

DST did not agree with conditions presented by AMTQT, both as regards the amounts required and the payment of the full price for the 20 years of use of infrastructures, having made AMTQT aware of its disagreement<sup>6</sup>.

On 20.07.2012, after a period of stalemate, a meeting between AMTQT and DST was held, having the Association been open to analyse the situation. It was agreed that DST would suggest a set of economical remuneration models, which it did and submitted to AMTQT by email sent on 26.07.2012.

On 27.09.2012, AMTQT presented a counter-proposal, and the parties pursued further the negotiation of values and conditions.

On 08.10.2012, DST decided to accept the commercial conditions presented by AMTQT, having recognised the need to solve the stalemate, notwithstanding the fact that some of the aspects involved were deemed not to be appropriate in the light of market practise.

According to the letter sent by DST to AMTQT, commercial conditions indicated by the Association, and accepted on that date, concerned remuneration due for the use of pipelines during the period of useful life, estimated to be a 20-year period, manholes included, and which were as follows: €3.10/m in the backbone; €3.76/m in local networks.

On 23.10.2012, AMTQT replied, imposing the following conditions for payment:

- 50% of the overall amount at the time of the signature of the contract or when fibre deployment works started; remaining 50% to be settled according to the evolution of works with a prior lodging of a guarantee;
- Other contractual conditions and terms to be established between the parties.

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<sup>5</sup> DST refers in this regard to document 4, in annex to the initial application, which however does not include any reference to the requirement that the full price for a minimum 20 year-period is due when pipelines are first used.

<sup>6</sup> DST failed to attach any evidence of its disagreement or of the date on which it expressed it.

DST believes that conditions for payment proposed by AMTQT are unacceptable as they are out of step with market conditions, and the early payment (at the time of the signature of the contract or at the start of works, that is, before pipelines are accepted) of a significant amount (50% of the overall contract amount) represents a high risk for DST, given that it is totally unaware of current network conditions that AMTQT is able to provide, in fact difficulties could arise when cable is laid.

On 30.10.2012, DST proposed to AMTQT that they signed a simple contract giving both parties time to finalise a contract that included not only financial obligations and obligations concerning the basic provision of access to pipelines but also all operational commitments and mutual reciprocal guarantees. Conditions proposed by DST are described in point 21 of its application.

On 02.11.2012, AMTQT rejected the conditions presented by DST and restated the conditions formerly conveyed, to which DST replied that it would not accept paying 50% of the overall amount of the contract at the time of the signature unless the Association provided guarantees, as it had absolutely no knowledge of the current network state<sup>7</sup>.

On 12.22.2012, AMTQT submitted to DST a minute of the “*contract for access to infrastructure suitable for the accommodation of fibre optic of Associação de Municípios da Terra Quente Transmontana*”, which included conditions already considered to be unacceptable by DST, namely those included in clauses 4<sup>8</sup> and 5<sup>9</sup> of the minute.

On 25.11.2012, DST returned the contract minute to AMTQT with amendments, which roughly entailed proposals presented by DST on 30.10.2012.

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<sup>7</sup> In the application that resulted in this administrative dispute settlement, DST failed to present a document attesting this communication.

<sup>8</sup> Clause 4: “*Conditions for payment. The payment of the total contract charge shall abide by the following conditions: 50% at the time of the signature of the contract. Remaining 50% shall be paid in the course of the period during which fibre optic is expected to be deployed, in monthly instalments or in a single instalment where works are expected to be concluded in a period of less than one month.*”

<sup>9</sup> Clause 5: “*Guarantee of payment. To guarantee payment of 50% of the total charge, the second party shall lodge a bank guarantee (...)*”.

On 05.12.2012 AMTQT replied to DST, submitting a new version of the contract, which practically rejects all amendments introduced by the latter and restores payment conditions it had established:

- 50% at the time of the signature of the contract and remaining 50% to be paid in the course of the period during which fibre optic is expected to be deployed, in monthly instalments, or in a single instalment, where works are expected to be concluded in a period of less than one month;
- Prior lodging by DST of a bank guarantee corresponding to 50% of the total contractual price;
- Levels of service (stages of deployment and operation): 6 days for final resolution and 24 linear hours for provisional resolution.

On 06.03.2013, DST made a last contractual proposal to AMTQT, accepting an up-front payment of the equivalent of a one-year contract, with the possibility of renewing the contract for 20 years, insofar as during the first year the acceptance of the network was possible, the remaining part, corresponding to 20 years, being settled after this acceptance.<sup>10</sup>

On 20.03.2013, AMTQT rejected DST's proposal<sup>11</sup>, and the latter decided to launch this administrative dispute settlement procedure.

However, after DST started the administrative dispute settlement procedure, DST and AMTQT managed to reach a minimum agreement on clauses of the contract to be concluded, having signed on 25.07.2013 the Contract for Access to Infrastructures Suitable For the Accommodation of Fibre Optic, being referred in clause 18, paragraph 1, that it would be "reviewed according to conclusions reached by ANACOM on allegations presented by DST on payment conditions".

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<sup>10</sup> According to document 14 in annex to the initial application. The document attached by DST in this regard, including 3 emails exchanged between the complaining party and the party complained against, informs of conditions proposed by the former, identifying as main factor for dispute between the parties, in DST's opinion, "*the advance payment for 20 years, without any guarantee and before the formal acceptance takes place*", referring also to a contractual minute that had been sent by AMTQT to DST on 30 January 2013.

<sup>11</sup> According to document 15 in annex to the initial application. In the document, AMTQT does not accept the contractual alternative that is suggested and refers to conditions defined in the minute of the contract that had been presented to DST, reiterating it.

By letter of 16.09.2014, DST recast the request made in the scope of the application of 25.03.2013, on the basis both of the time elapsed and the contract concluded in the meantime with AMTQT, requesting ANACOM to take a view on final conditions established for the remuneration for access to and use of the network held by AMTQT.

2. To this end, ANACOM held a meeting with AMTQT on 20.02.2015, at its premises in Oporto, to discuss the agreement concluded with DST for access to its pipelines. DST starts by considering conditions proposed by AMTQT to be illegal given that:

- AMTQT never approved or disclosed procedures and conditions for access to and use of its infrastructures, namely standard contractual conditions and remuneration conditions applicable for access to and use of infrastructures, as required under DL No. 123/2009 - articles 17, point ) and 18, paragraph 1, points d) and e).

*«The law imposes that the access to infrastructures suitable for accommodation of electronic communications networks is ensured under conditions of **equality, transparency and non-discrimination**, subject to cost-orientated remuneration conditions (...)*». DST refers that these principles *«prohibit access and use conditions, namely remuneration conditions, to become a barrier for whoever intends to obtain access»*.

It thus concludes that remuneration conditions that were established represent a clear barrier to access, as the Association requires DST to pay the full contractual price for the 20-year period during the first year of the contract, although the *“use of the leased property is postponed.”*

- The solution proposed by AMTQT is completely unbalanced, in the light of how a leasing contract works, declaring that this type of contract assumes that the consideration offered for using the leased property is paid periodically by the lessee as it uses the leased property, and that such rent is only due where the lessee is able to effectively use such leased property. DST claims that these are several legal provisions tending in this direction - referring point a) of article 1038 of the Civil Code, which provides that it is the lessee's obligation to pay the rent or lease, rent

meaning a periodic instalment (article 1075 of the Civil Code), and that, according to article 1039 of the Civil Code, the payment of rent or lease must be made on the last day of validity of the contract or the period to which it relates.

- The advance payment of the price in the course of the first year of the contract represents an advance financial burden and serves as a funding mechanism for AMTQT, representing on its own a violation of the principle of cost-orientation.
- In order to break the stalemate and to start quickly the fibre optic deployment works, DST accepted to pay 50% of the contractual price with the signature of the contract, in the scope with negotiations with AMTQT, in moment when it was not supposed to, as well as the remaining 50% after the fibre deployment was concluded, insofar as the Association waived the requirement of the provision of guarantee, and it provided itself a guarantee that ensured compliance with its obligation to make the network available for use under proper maintenance conditions, which was not the case.
- On the contrary, DST claims that AMTQT requires from DST, in addition to the advance payment of 50% of the total price of the contract at the moment of the signature of the contract, also the *«provision, on the same date, of a guarantee of 50% intended to guarantee the payment of the remaining 50%»*, which is deemed to be, in the perspective of the applicant, a *«doubly pernicious»* financial burden, as it aims to ensure the compliance with an illegal demand in the light of the principle of cost-orientation and imposes a financial burden on a financial burden. DST adds that this requirement is unnecessary taking into account the commitments it undertook in contract with the Portuguese State.

3. After the conclusion of the contract between DST and AMTQT, and having DST paid [beginning of confidential information - hereinafter BCI] [end of confidential information - hereinafter ECI] Euros (VAT included), corresponding to 50% of the price charged for the use of pipelines, DST recasts the request submitted on 28.03.2013, seeking from ANACOM, under article 10 of ECL and paragraph 3 of article 19 of DL No. 123/2009, that the

Authority «determines that access granted by the Association to DST complies with the following conditions:

- (i) Payment of the remaining contractual price ([BCI] [ECI] Euros) in annual instalments, due on 1 January each civil year;

Or in case the Authority does not agree with this,

- (ii) Payment of the remaining contractual price ([BCI] [ECI] Euros) upon conclusion of the fibre optic deployment by DST, with the lodging on this date of a bank guarantee on first demand by AMTQT, corresponding to 20% of the total contractual price concerning the first 10 years of the contractual period.

And, cumulatively,

- (iii) Non-lodging of any bank guarantee by DST.

**b. Notification of Associação de Municípios da Terra Quente Transmontana**

Having ANACOM made a preliminary analysis of DST's claims, it was found that:

- DST is an electronic communications company [point f) of paragraph 1 of article 3 of DL No. 123/2009], and as such, it is allowed to request ANACOM's intervention under paragraph 3 of article 19 of that statutory instrument;
- AMTQT is a public law association holding and operating infrastructures suitable for the accommodation of electronic communications networks and, as such, it must ensure access thereto in compliance with Chapter II of DL No. 123/2009,
- ANACOM is entitled to enforce compliance with obligations laid down in DL No. 123/2009 and to assess and decide on whether refusal of access to a given infrastructure is admissible or whether the remuneration required, - in this case by AMTQT - for access to infrastructures suitable for the accommodation of electronic communications networks abides by the rule of cost-orientation of prices, as provided for in the identified statutory instrument;

- The request for intervention was timely - on the date ANACOM's intervention was requested, one year had not yet elapsed on the date when negotiations between DST and AMTQT had started, and the stalemate/dispute on remuneration conditions only arises between September 2012 and March 2013;
- The decision taken by ANACOM binds both parties under dispute.

In the light of the above, on 17.05.2013<sup>12</sup>, ANACOM notified AMTQT of the application it had received so that it assessed the matter in writing, if it so wished, within 10 working days, in order to evaluate whether the remuneration demanded for the use of infrastructures concerned was appropriate, in the light of DL No. 123/2009, especially article 13, paragraph 4, and article 19, paragraphs 1 and 4, requesting AMTQT to submit within 10 working days, information indicated below:

- All information on suitable infrastructures (pipelines, masts, etc.) it uses or manages, identifying in particular:
  - o infrastructures suitable for the accommodation of electronic communications networks that are held or managed by the Association, according to point a) of article 17, bearing in mind sub-point i) of point a) of paragraph 2 of article 96 of DL No. 123/2009;
  - o the identification of held or managed infrastructures which are part of public or private domain of local authorities, and why was their management entrusted to AMTQT;
  - o procedures and conditions for access to and use of infrastructures that are held or managed by the Association, according to point c) of article 17, bearing in mind point b) of paragraph 2 of article 96 of DL No. 123/2009;
  - o Which electronic communication companies are installed in infrastructures that are held or managed by the Association, as well as terms and conditions applied to those companies;
  - o List of infrastructures registered so far.

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<sup>12</sup> Letter ANACOM-S021330/2013.



- Detail of costs involved, bearing in mind paragraph 1 of article 19 of DL No. 123/2009, both as regards the set of infrastructure associated to DST's request, as well as other accesses granted, as well as the reasoning for prices proposed for access.

DST was informed of steps taken on the same date<sup>13</sup>.

### ***c. Response from Associação de Municípios da Terra Quente Transmontana***

AMTQT replied by letter dated 30.05.2013<sup>14</sup>, providing the requested clarifications and assessing the matter raised by DST. AMTQT's response is structured in two parts (A - Background and B - Defence) which are summarised below.

#### **A - Background**

AMTQT starts by referring that ANACOM is aware of the existence of the community broadband network of Terra Quente Transmontana as from the public consultation on the use of infrastructures existing in the scope of «rural NGN» carried out by the Ministry of Public Works, Transports and Communications.

It adds that it demonstrated willingness to integrate its broadband network in the scope of NGN projects in rural areas. For the purpose, it attached a technical file with: (1) general description of the Community Broadband Network held by Terra Quente Transmontana (CBNTQT), in paper and digital format; (2) information in vector format of pipeline routes; (3) geo-referenced routes in DWG format; (4) backbone routes and local networks in paper and PDF format (letter AMTQT with reference No. 727, of 24.11.2012).

It adds through its letter No. 375, dated 03.06.2011, it made ANACOM aware of the interest showed by DST in using infrastructures held by AMTQT. In this letter, the Association requested from ANACOM information on whether there were pre-defined technical or financial conditions for access to the network or, if not, some support in the definition of such technical or financial conditions, respective rights

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<sup>13</sup> Letter ANACOM-S021334/2013.

<sup>14</sup> Received on 31.05.2013.

and obligations, as well as the definition of mechanisms for reviewing conditions to be established.

In the scope of this request, it adds that ANACOM<sup>15</sup> replied in 2011 that *“AMTQT’s involvement in the scope of the project of Rural NGN (in the North area) will only be possible where its network is somehow integrated with the network which DStelecom is bound to install, thus an agreement between these two bodies is required, DStelecom remaining responsible vis-à-vis the Portuguese State for compliance with its proposal. On the basis of this assumption, AMTQT’s network must comply with the same requirements as the network proposed by DStelecom. As such, this company is best qualified to provide information on technical and financial conditions applicable and to be complied with.»*

AMTQT stated that, by letter No. 293 of 16.05.2012, it informed ANACOM of the approval given to the request made by DST for provision of access to infrastructures suitable for accommodation of fibre optic.

It concludes that, given communications indicated above, AMTQT always believed that most information now requested would already have been supplied to ANACOM, and thus points a) and c) of article 17 and points a) and b) of paragraph 2 of article 96 and paragraph 1 of article 19 of DL No. 123/2009 would have been met.

However, as requested, it provided the following elements:

- General description of CBNTQT, in digital format;
- Vector format of pipeline routes;
- Geo-referenced routes in DWG format;
- Backbone routes and local networks in PDF format;
- Detailed calculation map of costs involved as defined in paragraph 1 of DL No. 123/2009;
- Minute of the pipeline lease contract concluded with DST on 30.01.2013;
- Pipeline lease contract concluded with REFER Telecom.

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<sup>15</sup> Letter ANACOM-S055501/2011 dated 06-07-2011.

It was also clarified that:

- Except for a few urban routes that are held by Municipalities and which were assigned for integration in the CBNTQT<sup>16</sup>, this network is owned by AMTQT;
- AMTQT is not provided with a manual of procedures and general conditions for access to and use of CBNTQT potential features, and only conditions for lease of pipelines have been defined.

Later, in response to concerns on an item concerning loans, the scope of which was not completely clear, and which represented an important portion of total costs presented, ANACOM requested, by fax dated 14.01.2014, that AMTQT provided information on the following issues:

- Amount of the demanded loan and the date on which it was taken;
- Loan period and associated APR (annual percentage rate of charge);
- Whether this loan concerned the whole CBNTQT project or only the construction (of pipelines);
- What the amount presented as loan specifically represented, namely whether it consisted in the loan amount or in charges incurred up to 2012 with interest rates and other charges, duly justifying this value;
- What costs were incurred in with the loan so far, as regards (i) interest rates, (ii) depreciations and (iii) other charges;
- Whether there are clauses in the loan contract that penalise early redemptions, indicating in detail the conditions included in such clauses;
- Whether costs presented in the table included in Annex to the letter dated 30 May 2013 correspond to the full costs of construction, maintenance, repair and improvement of CBNTQT pipes.

AMTQT replied to the ANACOM's request for information on 31.01.2014.

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<sup>16</sup> The Association refers that such routes are identified in the land register attached.

## **B - Defence**

On claims made by DST, AMTQT refers that:

- It is responsible for the management of CBNTQT telecommunication infrastructures that serve the Municipalities of Terra Quente Transmontana (Alfândega da Fé, Carrazeda de Ansiães, Macedo de Cavaleiros, Bragança and Vila Flor) and Bragança, being associated to the Instituto Politécnico;
- This network is made up of a central ring that connects all seats of local government (backbone), five Local Networks, one in each seat of local government, five centers of POP transmission and an inter-municipal Data-Centre established in AMTQT, in Mirandela;
- Implemented infrastructures consist of underground three-pipe pipelines with a mixed-fibre-optic cable made up of 48 fibres between POPs;
- CBNTQT, owned by the Municipality Association, was constructed in the scope of the application to the *Programa Operacional Sociedade de Conhecimento* (POSC - the Knowledge Society Operational Programme), axis IV, «Massifying access to the information society», measure 4.1 - Reinforcing broadband infrastructures, a project which on 04.04.2007 was approved by the Minister for Science, Technology and Higher Education, the respective certificate of acceptance being dated 21 May 2007.
- The built infrastructure had an eligible value of 7,697,463.06€ and a FEDER grant rate by 45%, AMTQT undertaking to ensure the rest;
- The provisional acceptance of CBNTQT by Ad MTQT is dated 26.01.2012;
- By order of the Secretary-General of AMTQT of 16.05.2012, DST was granted access to the infrastructure suitable for the accommodation of fibre optic in compliance with article 22 of ECL and article 13, paragraph 1, of Decree-Law No. 258/2009;
- DST was informed of the approval of the request for access against payment of €3.10/m in the backbone and €3.76/m in local networks, by letter AMTQT of 16.05.2012 (reference 291);

- Unit costs indicated were calculated on the cost component borne by AMTQT, under paragraph 1 of article 19 of DL No. 123/2009, according to the calculation map that is attached.

AMTQT refers also that documents presented by DST show that, as from the date on which the cost for the use of pipelines was defined, the company claimed all sorts of arguments with the purpose of minimizing unit costs of use of pipelines, to the point of questioning the legality of conditions of payment of the remuneration due for access. It refers that, among arguments presented, DST mentions that *«in the scope of the implementation of the contract with the Portuguese State, the company needs to have access to pipelines held by the association to deploy fibre optic»* given that, according to paragraph 2 of clause 5, it must give preference to the use of network accommodation infrastructures that already exist, where this is feasible at technical and economic level.

As far as this argument is concerned, AMTQT claims that, if DST does not consider the use of pipelines held by AMTQT, with advance payment of the full contractual price, to be feasible, it is not required to abide by the preference, and is entitled to build new pipelines and other infrastructures deemed to be required.

In AMTQT's view, DST mistakes lease of pipelines with lease contract, which is not considered to be correct, as the lease of pipelines is governed by DL No. 123/2009, while the lease contract is governed by the Civil Code.

AMTQT believes also that the advance payment of values due for the use of pipelines is not illegal.

As regards the provision of guarantees, AMTQT does not agree with the terms requested by DST, as it does not accept to incur in charges for a 20-year period in order to lease an infrastructure that it owns, and, in addition, it considers that the terms of the contract to be concluded guarantee DST the use of pipelines for a minimum period of 20 years, as well as levels of service for the fibre optic deployment and operation stages.

As regards the advance payment of the contractual price, with the lodging of a bank guarantee by DST, AMTQT declares that this issue had been dealt with, and regrets that the applicant failed to refer to the contract proposal of

30.01.2013, which is attached, where this issue was withdrawn from the negotiation.

The document attached by AMTQT, which was approved at a meeting of the Board of Directors of this association on 31.01.2013, provides in clause 5 the following payment conditions: 50% upon signature of the contract; remaining 50% after deployment of fibre optic and verification of proper state of pipelines, not later than 3 months.

The list of clauses does not present any reference to the lodging of bank guarantees between the parties.

AMTQT does not present any document attesting that this minute proposal was sent to DST, however documents attached by DST itself to the initial application to this procedure refer to a minute that was sent to DST on 30.01.2013 and which was approved by the Board of Directors of the association<sup>17</sup>.

Finally, AMTQT declares that it has allowed access to its infrastructures under conditions of equality, transparency and non-discrimination, under cost-oriented remuneration conditions, in full compliance with provisions laid down in DL No. 123/2009, as attested by the contract concluded with REFER Telecom, which is attached.

### **C - Draft Decision - hearing of stakeholders**

Taking into account the application submitted by DST, bearing in mind the elements and arguments presented both by the complaining party and by the party complained against, ANACOM decided, on 25 June 2015, as draft decision (DD) - DE1912015CA:

*«1. Not to examine the application submitted by DST, in the part where the company requests ANACOM to determine the alteration of contractual conditions agreed for access to infrastructures held by AMTQT, as this Authority considers not to have competency to assess the matter for the reasons described above, and to rule only on the adequacy of the*

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<sup>17</sup> Vide document 14. Document 15 also mentions the existence of a contract minute presented in due time, which however fails to refer to the respective date.

*remuneration requested from AMTQT to DST for the use of infrastructures suitable for the accommodation of electronic communications networks of which it is the owner, in the light of the principle of cost-orientation of prices laid down in paragraph 1 of article 19 of DL 123/2009.*

*2. To consider that the remuneration requested by AMTQT to DST for access to infrastructures suitable for accommodation of fibre optic shows no evidence of not being cost-oriented or of being discriminatory.*

*3. To submit points 1 and 2 of this determination to the prior hearing of stakeholders, under articles 100 and 101 of the Code of Administrative Procedure, approved by Decree-Law No. 442/91, of 15 November, as amended by Decree-Law No. 6/96, of 31 January, a 10-day period being granted for written comments from DSTelecom Norte, S.A. and Associação de Municípios da Terra Quente Transmontana.»*

The DD was properly notified to the complaining party and to the party complained against on 26.06.2015, through letters ANACOM-S046789/2015 and ANACOM-S046790/2015, respectively.

These letters were received by DST on 08.07.2015 and by AMTQT on 29.06.2015.

Having expired the deadline set out for the prior hearing, and no comments having been received from either party, the direction taken in the determination of 25.06.2015 (DE1912015CA) is maintained.

## **II. Analysis**

### ***a. Legitimacy***

DST is a commercial company that pursues the activity of provider of publicly available electronic communications networks and services under the terms set out in ECL - it is an “electronic communications company” for the purpose of DL No. 123/2009 [article 3, paragraph 1 f) of the identified Decree-Law].

AMTQT is an association with specific purposes, which maintained the nature of legal person of public law under Law No. 45/2008, of 27 August (Legal Regime of Municipal Association<sup>18</sup>), the operation of which abides by the identified Law and the respective Statutes<sup>19</sup>. Under Law No. 45/2008 [article 37, paragraph 1d), applicable *ex vi* article 38, paragraph 5], associations of municipalities with specific purposes are subject to the legal regime of administrative supervision, provided for in Law No. 27/96, of 1 August<sup>20</sup>.

Being an association of municipalities and a legal person of public law subject to administrative supervision, AMTQT is governed by point b) of article 2 of DL No. 123/2009 and, as such, in the scope of infrastructures suitable for the accommodation of electronic communications networks that it holds or manages, it is subject to access obligations laid down in Chapter III of that statutory instrument, pursuant to paragraph 1 of article 13 thereof.

Given that a dispute exists on the value of the remuneration requested for the access to and use of infrastructures held by AMTQT, DST is entitled to request ANACOM to assess and decide on whether the remuneration amount requested is appropriate, in the light of paragraph 3 of article 19 of DL No.123/2009, a decision which is binding on both parties.

**b. Subject-matter of the dispute**

DST ends the application submitted on 16.09.2014, requesting that ANACOM «**determines (...) that the access granted by the Association to DST complies with the following conditions:**

- (i) *Payment of the remaining contractual price ([BCI] [ECI] Euros) in annual instalments, due on 1 January each civil year;*

*Or in case the Authority does not agree with this,*

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<sup>18</sup> Available at: <http://www.dre.pt/pdf1s/2008/08/16500/0600506011.pdf> .

<sup>19</sup> Published in Series III of the Official Gazette, No. 232, of 1 October 2004. AMTQT was constituted on 2 July 1982 by the Municipalities of Alfândega da Fé, Carrazeda de Ansiães, Mirandela and Vila Flor, which were later joined by the Municipality of Macedo de Cavaleiros.

According to paragraph 1 of article 1 of its bylaws, AMTQT is an association of municipalities with specific purposes. Available at: <http://dre.pt/pdfgratis3s/2004/10/2004D232S000.pdf> (page 27 *et seq.*)

<sup>20</sup> Available at: <http://www.dre.pt/pdf1s/1996/08/177A00/22342237.pdf> .



(ii) *Payment of the remaining contractual price ([BCI] [ECI] Euros) upon conclusion of the fibre optic deployment by DST, with the lodging on this date of a bank guarantee on first demand by AMTQT, corresponding to 20% of the total contractual price concerning the first 10 years of the contractual period.*

*And, cumulatively,*

(iii) *Non-lodging of any bank guarantee by DST.*

DL No. 123/2009 does not confer on ANACOM the competence to establish specific provisions in contracts governing the access to and use of infrastructures suitable for the accommodation of electronic communications networks.

According to powers conferred for the settlement of disputes in the scope of chapter II of DL No. 123/2009, ANACOM is entitled to decide whether the refusal of access to infrastructures suitable for the accommodation of electronic communications networks is admissible (article 16) and whether the remuneration requested for the use thereof is appropriate, assessing whether such remuneration complies with the rule of cost-orientation of prices set out in article 19.

Paragraph 3 of article 19 of DL No. 123/2009 lays down also that «...at the request of electronic communications companies, or of any of the bodies referred to in article 2, ICP - ANACOM shall assess and decide, in a particular case, whether the amount requested is appropriate in the light of the rule established in paragraph 1<sup>21</sup>...». Paragraph 1 of article 19 lays down that the «...remuneration for access to and use of infrastructures held by bodies referred to in article 2 must be cost-orientated, taking into account costs with the construction, maintenance, repair and improvement of infrastructures under consideration».

In this scope, it must be taken into account that DL No. 123/2009 contains in point t) of paragraph 1 of article 3, a definition of remuneration for access - «the amount due by publicly available electronic communications companies

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<sup>21</sup> By mistake, corrected by Law No. 47/2013, of 10 July, paragraph 3 of article 19 determined the assessment of the conformity of the remuneration with the rule «established in the preceding paragraph», which however failed to establish any rule on the remuneration due for the access to and use of infrastructures suitable for the accommodation of electronic communications networks.

*for the use of infrastructures suitable for the accommodation of electronic communications networks, to install, accommodate, repair and remove cables.»*

Infringement of decisions issued by ICP - ANACOM in the exercise of the above-mentioned powers is deemed to be a breach, as follows from points f) and h) of paragraph 1 of article 89 of DL No. 123/2009.

Given the framework described above, the matter to be analysed and decided on must now be defined.

Therefore, bearing in mind that AMTQT readily approved the request for access submitted by DST to the infrastructure suitable for the accommodation of fibre optic, ANACOM's intervention in the scope of this dispute will focus on the issue of whether the remuneration specified is appropriate in the light of the rule of cost-orientation of prices set out in paragraph 1 of article 19 of DL No. 123/2009.

**c. *Assessment of the appropriateness of the remuneration in the light of the rule of cost-orientation of prices***

DST considers in its initial application that conditions for payment required by AMTQT are incompatible and illegal in the light of the principle of cost-orientation of prices, supporting this view with the following arguments:

- The contract to be concluded between AMTQT and DST is a contract for the lease of pipelines and other network elements. The requirement for the payment of the full contractual price concerning the 20-year period during the first year of the contract is «...***completely unbalanced, in the light of how a leasing contract works...*** [which] *assumes that the consideration offered for using the leased property (that is, the price) is paid periodically by the lessee as it uses (or is given the possibility to use) the leased property, and that such rent is only due where the lessee is able to effectively use such leased property*».

The demand for an advance payment of the price in the course of the first year of the contract represents an advance financial burden and serves as a funding mechanism for AMTQT. The advance payment of the price is, on its own, a violation of the principle of cost-orientation of prices.

- DST decided to meet the conditions for payment demanded by AMTQT under the condition that the Association, upon payment of the first half of the price, provided a bank guarantee on first demand, corresponding to 20% of the total contractual price concerning the first 10 years and 10% in the remaining contractual period. That guarantee had the purpose of ensuring compliance by AMTQT with the obligation to provide the use of the network under proper conditions of maintenance for the whole period of the contract concluded between the two parties. DST believes that, failing this guarantee, it faces a real risk of having the leased property for a shorter period than what it paid for, which will result for the Association in a remuneration that exceeds the costs of construction and maintenance of the network, in violation of the principle of cost-orientation of prices.
- The requirement made by AMTQT, that DST, at the moment of the signature of the contract, lodges a bank guarantee intended to guarantee the payment of the remaining 50% of the price, is deemed to be, not only absolutely useless, but also an additional financial burden on a financial burden which DST also classifies as illegal. This requirement is also *«...inappropriate and illegal, in the light of the principle of cost-orientation»*.

In ANACOM's view, and without getting into the argument of what type of contract will qualify DST for access to and use of AMTQT's pipelines<sup>22</sup>, it must be stressed that under paragraph 1 of article 1039 of the Civil Code, which is partially quoted by DST, *«the payment of rent or lease must be made on the last day of validity of the contract or the period to which it relates, at the address of the lessee on the due date, where parties or practices do not establish otherwise»*. As results from the excerpt now underlined, parties are entitled to establish, by agreement, the moment on which the value of the rent or lease is to be paid. The advance payment of the remuneration is without prejudice to the reduction of the amount due, where during the performance of the ongoing contract, the lessee is subject to a reduced use of the leased property, or deprived from it.

On the other hand, article 1075 of the Civil Code, paragraph 1 of which is invoked by DST to support the periodic nature of the rent, must be considered within the

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<sup>22</sup> DST considers it to be a lease contract; AMTQT believes it to be a contract for the lease of pipelines governed by DL No. 123/2009. On this issue, it should be referred that DL No. 123/2009 does not characterize nor typify the contract that governs the access to and use of infrastructures suitable for the accommodation of electronic communications networks, leaving holders of such infrastructures free, within certain limits, to define the terms, which must be published, governing such access and use as deemed fit.

systematic context in which it is included. This rule is integrated in the section of the Civil Code that rules the rent (in full or in part) of urban buildings, and as such, it does not apply to lease contracts in general.

In order to examine whether the remuneration requested complies with the requirement of cost-orientation of prices laid down in paragraph 1 of article 19 of DL No. 123/2009, AMTQT was requested, as referred earlier, to submit all information on infrastructures (pipelines) it holds/manages, including detailed costs involved, both as regards the whole of infrastructure associated to DST's request, and to other requests for access.

#### The network and respective construction costs

According to information conveyed by AMTQT on the network it operates, this network is made up of a central ring that connects all seats of local government (backbone) that are members, at a speed of 10 Gbps and a broadband connection to the exterior network, and five local network (where the five PoPs are located), and an inter-municipal Data-Centre established in AMTQT, in Mirandela<sup>23</sup>.

These infrastructures consist in underground three-pipe pipelines, deployed in prefabricated permanent manholes, and in these pipelines - between PoP - a fibre optic cable of 48 fibres (called link) was deployed. Optic distances measured for links are indicated in the following tables, according to technical information submitted by AMTQT.

[BCI] [ECI]

From information received, it may be concluded that, in total, 373.525 Km of fibre optic was installed.

As regards construction costs of supporting pipeline infrastructures, AMTQT submitted the following information:

[BCI] [ECI]

As such, average construction costs per single-pipe - costs not reimbursed by public funds and which include bank loans - are:

- €3.10/m in the backbone (236.241 Km);
- €3.76/m in the access network (in average, for around 32 Km of pipelines).

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<sup>23</sup> The fibre optic core ring, known as CBNTQT backbone, consists in physical infrastructures that allow the interconnection of transmission centres, Pop or Data-Centre, which were constructed or installed in Municipalities covered by the project.

Conditions for provision to REFER Telecom of access to pipelines

AMTQT concluded, in early 2013, a contract with REFER Telecom for the access to and use of infrastructures owned by AMTQT, with the following characteristics and conditions: [BCI] [ECI].

Remuneration specified in the contract between AMTQT and DST

The application recast by DST does not question the principle of cost-orientation of prices, and focuses on conditions for payment. In any case, this Authority analysed data supplied by AMTQT.

As such, according to available data, it is deemed that the total cost of construction of pipelines for the purpose of the determination of the cost of access must include the value of “Transfers from AMTQT and Municipal Councils”, plus paid interest<sup>24</sup> and capital amortisation up to the date of signature of the contract, as well as the amount of capital outstanding on that date, in the proportion of the area effectively occupied (a single-pipe).

The view expressed above is based on the fact that an initial payment was requested, and, as such, the amount of capital outstanding may be reimbursed in advance.

In addition, it is deemed that, although AMTQT did not include costs relating to infrastructure operation and maintenance, an analysis of cost-orientation of prices should take this component under consideration. For want of better information, and according to the method adopted, for example, in the assessment of prices for access to MEO's pipelines, an annual cost of [BCI] [ECI] % of the value of investment in the construction of infrastructures is deemed to be reasonable.

The value that results from the sum of components detailed above and values duly updated at the date of the contract is compatible, in a perspective of cost-orientation of prices, with the value that AMTQT requests from DST for access to its pipelines, in the conditions for payment included in the signed contract, and, as such, there is no evidence that the price proposed does not comply with that principle.

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<sup>24</sup> As AMTQT requires remuneration for a value which is paid only once, there is no point in calculating all interest to be paid throughout the period of the bank loan, given that the value corresponding to the capital outstanding would fully repay the loan, thus no future interest would be incurred in.

It must also be referred that the contract between AMTQT and DST includes the same payment conditions [BCI] [ECI].

### Conclusion

In the light of facts described above, it seems to be clear that AMTQT does not refuse access to its infrastructure, rather provides it in an identical way to interested operators, with transparency and without discrimination.

It may thus be also concluded that there are no signs that the price for access to pipelines (per single-pipe) is not cost-oriented or is discriminatory.

### **III. Decision**

Having weighted findings and the analysis undertaken, and in the pursue of powers provided for in points b) and g) of paragraph 1 of article 8 of Statutes in annex to Decree-Law No. 39/2015, of 16 March, ANACOM's Management Board, in the exercise of competences conferred by paragraph 3 of article 19 of DL No. 123/2009, of 21 May, as amended by Decree-Law No. 258/2009, of 25 September, Law No. 47/2013, of 10 July and Law No. 82-B/2014, of 31 December, decides, pursuant to point q) of paragraph 1 of article 26 of ANACOM's Statutes:

1. Not to examine the application submitted by DST, in the part where the company requests ANACOM to determine the alteration of contractual conditions agreed for access to infrastructures held by AMTQT, as this Authority considers not to have competency to assess the matter for the reasons described above, and to rule only on the adequacy of the remuneration requested from AMTQT to DST for the use of infrastructures suitable for the accommodation of electronic communications networks of which it is the owner, in the light of the principle of cost-orientation of prices laid down in paragraph 1 of article 19 of DL No. 123/2009.
2. To consider that the remuneration requested by AMTQT from DST for access to infrastructures suitable for accommodation of fibre optic shows no evidence of not being cost-oriented or of being discriminatory.