DECISION

Application for administrative dispute-settlement intervention -

Non-compliance with customer drop procedures in the scope of the Reference Poles Access Offer

Contents

1. MEO's application

MEO - Serviços de Comunicações e Multimédia, S.A. (MEO or Applicant), through communication dated 15.02.2018[1], applied for the intervention of Autoridade Nacional de Comunicações (ANACOM), in the scope of the administrative dispute-settlement procedure provided for in article 10 of Law No. 5/2004, of 10 February (Electronic Communications Law - ECL) and paragraph 7 of article 19 of Decree-Law No.123/2009, of 21 May (DL 123/2009), alleging misconduct on the part of Vodafone Portugal – Comunicações Pessoais, S.A. (Vodafone or Party complained against), as regards procedures established and governed by the Reference Poles Access Offer (RPAO or Offer) [2] in force, in particular, the installation of customer drops.

In brief, the Applicant alleges that, as from August 2017, Vodafone, beneficiary of the Offer, changed its behaviour, no longer submitting requests for intervention, without any sort of justification, although that company continued to use MEO's poles to establish connections to its end customers.

MEO declared that, up to 04.08.2017, Vodafone used to communicate in advance the installation of customer drops, paying the amounts provided for in RPAO both for occupation as well as for monitoring/supervision activities, the latter where appropriate. In order to submit customer drop requests, Vodafone used a specific email address (orap_drops_cliente@telecom.pt) and a template created by the Applicant for the purpose, in the scope of a standardization of intervention procedures for drop installation which took place in October 2015.

According to MEO, under RPAO, a customer drop consists of an installation that does not require a prior technical viability analysis, however a prior request must be submitted to MEO - "*intervention*" service (*vide* points 4.2 and 4.4 of the Offer). Where the Applicant does not monitor the installation work, it bills only the respective occupation, according to table 9 of point 7.3 of the Offer. Where the monitoring and supervision of the installation work carried out by the beneficiary takes place, prices provided for in point 7.6 of RPAO (according to table 10) also apply.

[1] With reference S12/2018CEO.
[2] Available at http://ptwholesale.pt/pt/servicos-nacionais/infraestruturas/Paginas/orap.aspx.

In the context of the *intervention* service, it is also incumbent on the beneficiary to submit to MEO information on the record of cables and equipment within at the most 30 (thirty) calendar days, whenever a change in the installation settings of cables and equipment takes place (under point 4.4. of RPAO). According to the Applicant, this allows it to be aware of whatever has been installed on its poles, and ensures the continuous update of its network record, providing also the basis for the billing of such occupation.

MEO claims that Vodafone has failed to meet conditions provided for in RPAO in a serious and repeated manner, as the latter:

i. Installed several customer drops without compliance with procedures required for the purpose (that is, failing to submit an express request for intervention), attaching a list of examples in annex II to its presentation;

ii. Failed to pay the monthly price due for the occupation; and,

iii. Failed to send the record of cables and equipment installed on MEO's poles.

MEO further claims that Vodafone's behaviour prevents the Applicant from being aware of the actual size of space unduly occupied by that operator, and consequently, from controlling the use of its infrastructure and from billing the attachments installed on drop-supporting poles.

Moreover, the Applicant alleges that Vodafone failed to make the payments for drops installed on MEO's poles, before August 2017, date on which it changed its behaviour, submitting Vodafone's unpaid bills for this purpose, totalling **[Beginning of Confidential information - BCI] [End of Confidential information - ECI]** €. MEO believes that amounts yet to be billed could also be added, as it is not aware of how many drops were actually installed on its poles by the Party complained against and how many will it install in the future.

The Applicant also argues that Vodafone's behaviour prevents it from complying with general obligations that fall on owners of suitable infrastructures, provided for in article 17 of DL 123/2009, and makes it impossible for it to use its infrastructure efficiently and to be aware of its state of occupation, "(…) *as provided for in paragraph 1 of article 22 and*

paragraph 3 of article 23 of that statutory instrument", reason for which it considers ANACOM's intervention to be particularly urgent.

MEO adds that where Vodafone does not intend to comply with rules set out in RPAO, including the payment of the price, "(…) *a dispute arises as to specific conditions that apply to the use of suitable infrastructures (in particular MEO's remuneration), under paragraph 7 of article 19 of DL 123/2009*."

In the light of the above, MEO believes that it is left with no choice but to apply to ANACOM *"(…) for an urgent intervention under the terms and for the purposes of articles 63 and 64 of* [ECL], *taking into account the clear violation of RPAO, DL 123/2009 and* [ECL]*".*

MEO alleges that there is a different interpretation of provisions of RPAO, whereby a dispute exists that must be settled via the dispute settlement mechanism provided for in point 9.4 of RPAO and article 10 of ECL.

In short, MEO applies for ANACOM's intervention as follows:

i. Administrative settlement of the dispute at stake, as it considers that the conditions for the intervention of this Authority are satisfied, under article 10 of ECL and article 19, paragraph 7, of DL 123/2009.

ii. To determine on Vodafone that it immediately:

   a- Refrains from maintaining the current behaviour in the scope of RPAO, namely as regards procedures and default in payment concerning the occupation of customer drops, and resumes the behaviour followed up to August 2017, until the dispute under consideration is finally settled; and,

   b- Identifies all customer drops unduly installed to date on MEO's infrastructure, as well as all those that it abusively installs in the future,

Further to the consultation of the administrative procedure carried out on 17.05.2018, MEO restated its application for urgent intervention, via a communication[3] submitted to this Authority on 29.05.2018, informing that "*Vodafone continues not to observe the rules set out in MEO's RPAO, including the payment of the price due (…)*". As such, it declares

[3] With reference S0147.

that "*the grounds remain for the application for a determination that Vodafone refrains from maintaining the current behaviour in the scope of RPAO (…), namely as regards procedures and default in payment concerning the occupation of "customer drops", and resumes the behaviour followed up to August 2017, until the dispute under consideration is finally settled*."

2. Vodafone's position

Vodafone, the Party complained against, submitted its position concerning the subject under dispute on:

i. 16.11.2017, in its communication in response to MEO's letter of 19.10.2017[4], which was attached to MEO's application for administrative dispute-settlement;
ii. 05.03.2018, in its communication in response to another letter from MEO, of 15.02.2018[5], which was notified to ANACOM on the same date; and,
iii. 15.03.2018, through a communication sent via email directly to this Authority (it must be stressed in this regard that Vodafone was informed by MEO, on 05.03.2018, that an application for administrative dispute-settlement had been submitted to ANACOM, according to a document attached to the referred communication).

In above-mentioned communications, Vodafone took the view that it is under no obligation to present to MEO a prior customer drop installation request in the scope of RPAO. However, under that assumption, it accepts to discuss the implementation of a procedure in this matter involving a simple communication or the submission of a record, that is in accordance with the best practises followed by bodies that provide access to their infrastructures suitable for the accommodation of electronic communications networks in Portugal.

According to the Party complained against, the referred request is not required on the basis of considerations made by ANACOM itself on the matter, in the scope of the review of markets of wholesale local access at a fixed location and wholesale central access at a fixed location (Markets 3a and 3b, respectively) and the analysis carried out by this Authority to amendments to RPAO introduced by MEO following that market review. As such, Vodafone stresses that "*one of the reasons that determined the suspension, by*

[4] With reference 050720174.
[5] With reference S11/2018CEO.

ANACOM, of amendments made to RPAO by MEO, was precisely the fact that the procedure proposed by MEO for the installation of customer drops was inappropriate."

Vodafone thus considers that the procedure under consideration, that concerns the installation of customer drops by the RPAO beneficiary, fails to comply with ANACOM's determinations adopted in this context. The company declares that its behaviour is in compliance with ANACOM's decision to adopt interim and urgent measures regarding suspension of the entry into force of amendments to the Reference Duct Access Offer (RDAO) and RPAO, dated 29.06.2017, under which version 5 of RPAO, published by MEO on 30.05.2017, was suspended. In the perspective of the Party complained against, version 3.1 of RPAO - which is currently in force (as from 06.07.2017) - "***should never be understood as requiring beneficiaries to submit a customer drop installation request***" (emphasis added on the original text).

Vodafone argues that, given that the prior viability analysis is not required (according to point 4.2 of RPAO), the requirement for the submission of a request for installation is rendered meaningless, as its examination would be void. It further states that, although this requirement seems to follow from the text of point 4.4 of the Offer, it does not match any behaviour that is remotely compatible with the timings and reality of a customer drop installation. It refers in general to the procedure provided for Annex 3 of the Offer, established, according to Vodafone, for a request for construction, thus, at the most, there would be a significant gap as regards how the alleged obligation for the submission of a request could be rendered effective.

This perspective is confirmed, Vodafone believes, by the fact that the point concerned existed in RPAO since its initial version (version 1.0) dated 2010 and that, before the end of 2015, MEO never required the submission of a customer drop installation request. This perspective is also confirmed by the fact that the matter under consideration underwent a drastic change in the new version of RPAO (which Vodafone itself identifies as version 4.1[6]) drawn up by MEO, which introduced a whole new procedure, in a new and separate point entitled "*Customer Drop Installation*" (point 4.3 of version 5 of RPAO). Vodafone considers this to be an express acknowledgement on the part of MEO that the obligation

[6] In Vodafone's communication of 16.11.2017, attached to MEO's application for intervention.

to present a customer drop installation request did not exist until then, and that MEO felt the need to introduce new amendments to the subject.

Vodafone adds that its arguments apply also, duly adapted, to the submission of the respective record, given that "*any apparent textual obligation in this regard requires a procedure for the purpose; historically, it has also not been carried out by MEO or Vodafone (…) and this matter has been subject to a substantial amendment in version 4.1 of RPAO (new point 4.8 of the body of the offer)*."

As such, the (additional) procedure created in October 2015, through which - according to Vodafone - MEO required the submission of a customer drop installation request, only confirmed the existence of a gap in version 3.1 of RPAO in this respect. And although this procedure was followed by its commercial teams, this does not mean that Vodafone agrees with it. However, given that crucial infrastructures were expanding their footprint, MEO was a compulsory commercial partner, that could harm customer installations and Vodafone's customer acquisition ability, and even call into question the company's market image and reputation.

Vodafone raises also an issue of discriminatory treatment, declaring that "*as far as the market is aware - none of the other beneficiaries of RPAO has abided by the procedure launched by MEO in October 2015, thus any lack of diligence on the part of MEO to impose its application of such operators represents a serious discriminatory treatment of Vodafone*."

Believing that there are no grounds to change its position, Vodafone challenges MEO's position in this regard, as well as its consequent decision to reject requests for the installation of sleepers (according to email sent by MEO to Vodafone on 14.09.2017, document No.2 attached to the communication of the Party complained against dated 15.03.2018), on account of the failure by Vodafone to submit the customer drop installation request, highlighting the serious consequences that arise to the company from this fact.

In this context, the Party complained against also informs that it has struggled to carry out the connection of new customers and network repairs, as "*several Municipalities now make the licensing (latu sensu) of urban operations dependant on the presentation of "RCAO" and "RPAO" titles*". It declares that it was required, for example, by the

Municipalities of **[BCI] [ECI]** and **[BCI] [ECI]**, to present the authorization of the owner of infrastructures (RCAO and RPAO, in the case of MEO) whenever it intended to install customer drops.

In document No.3 attached to its communication of 15.03.2018, Vodafone presents an email dated 07.03.2018, sent by the Municipality of **[BCI] [ECI]**, which states that "*as regards the authorization and viability (RCAO), to be granted by the body in charge of CVPS to be used, (PT/MEO), it is required for the process to continue. Therefore, we inform that without such viability and authorization for use, **you will not be allowed to connect cables in existing underground ducts***." (emphasis added in the original text).

Lastly, Vodafone declares that the matter at issue is the subject of an analysis by ANACOM in the scope of the ongoing review of RCAO and RPAO, insisting that this Authority completes the respective procedure swiftly "*so as to clarify that the requirement for customer drop installation requests is, not only manifestly unfounded, but even contrary to ANACOM's determinations*", alerting to the potentially very dangerous consequences to the company's business, as well as to competition in the sector and ultimately, users/consumers.

3. Procedure analysis

3.1. Application for administrative dispute settlement

3.1.1. Article 10 of ECL

Under paragraph 1 of article 10 of ECL, ANACOM is competent, at the request of either party, to settle, by way of a binding decision, *"(…) any dispute connected to the obligations arising under this law, between undertakings subject thereto in the national territory (…)"*.

The dispute at stake concerns the different understanding/interpretation made by parties (MEO and Vodafone) as regards the conditions set out in a regulated Reference Offer - in this case, RPAO -, involving procedures for the installation of customer drops. The obligation to publish the RPAO currently stems from the imposition of obligations on MEO, as company with significant market power (SMP) in the above-mentioned Market 3a, under articles 66 and 68 of ECL, which is a specific condition, under article 28, point a), of the same law.

On its turn, paragraph 2 of article 10 of ECL lays down that ANACOM's intervention must "*be requested within a period of one year from the date on which the dispute commenced*."

MEO's application attaches the first email through which it alerted Vodafone to the fact that customer drop requests were not being submitted, dated 07.08.2017. It is Vodafone's communication, dated 16.11.2017 (which is also attached to MEO's application), that confirms the existence of a dispute on procedures for customer drop installation in the scope of RPAO.

Having MEO's application for intervention been submitted on 15.02.2018, it is deemed that it was presented within the time limit provided for in the law, as one year has not elapsed since the Applicant, further to several communications sent to Vodafone, was aware of the position taken by the latter as regards procedures for customer drop installation, which lie behind this dispute.

As such, on the basis of elements presented by MEO, ANACOM is found to be competent to settle the dispute under consideration, and there are no grounds that justify the rejection of the application, under article 11 of ECL.

3.1.2. Article 19, paragraph 7, of DL No. 123/2009

Under paragraph 7 of article 19 (Remuneration of the access to suitable infrastructures) of DL 123/2009, in the "(…) *case of a dispute over the applicable specific conditions, including the price and respective terms of payment, the parties can appeal to ANACOM, once 30 days have elapsed after the date of receipt of the request for access, with the application, without prejudice to the provisions in the following subparagraphs, of the regime for the settlement of disputes established in the Electronic Communications Law* (…)".

As regards the integration of the application in the regime provided for in this standard, ANACOM does not identify any evidence that legitimises the application of the referred provision. In fact, both MEO's application, including the correspondence exchanged with Vodafone, on which such application is based, and communications sent directly by Vodafone to ANACOM, place this dispute in the scope of procedures and conditions defined by the Applicant in RPAO - Reference Offer regulated in the context of ECL and

review of Market 3a (regulation of operator with significant market power or asymmetrical regulation).

As referred, on the one hand, MEO claims that Vodafone has failed seriously and repeatedly to comply with RPAO, as the company installed several customer drops without observing procedures set out for the purpose, without paying the corresponding monthly price and without subsequently sending the record. On the other hand, Vodafone challenges the specification of the procedure for communication for customer drop intervention requests, established by MEO in October 2015, although it did comply with it - between the end of 2015[7]/beginning of 2016[8] and the beginning of August 2017 - as the company itself acknowledges in the letter sent to MEO, attached to the application for intervention sent to ANACOM.

This is thus a conflict that must be analysed in the context of RPAO, an offer regulated by ANACOM, pursuant to its powers to review markets and to impose obligations under ECL, thus being fully governed by this law.

Moreover, to support the settlement of the dispute that opposes it to Vodafone under powers conferred on ANACOM pursuant to article 19, paragraph 7, of DL No. 123/2009, MEO presents facts as resulting in a dispute on specific payment conditions. As such, this case is not so much a divergence on specific conditions that apply to remuneration - including the price - but rather an alleged failure to comply with conditions established in a regulated Reference Offer in force, stemming from a different interpretation as to the applicability of conditions of RPAO.

Once again, this is an analysis that must be carried out in the light of provisions set out in RPAO, and, consequently, in the framework of article 10 of ECL, a statutory instrument that prevails over the regime set out in DL No. 123/2009, as the latter in fact determines (*vide* paragraph 2 of article 1).

It does also not follow from elements included in the file that Vodafone submitted to MEO any request for access (in this case, to MEO's poles), as required by paragraph 7 of article 19 of DL No. 123/2009. On the contrary, in the application for intervention submitted to ANACOM, MEO expressly refers that it is "(…) *prevented from controlling the use of its*

[7] According to MEO.
[8] According to Vodafone.

infrastructure and from billing Vodafone for the attachments installed on drop-supporting poles, not being aware of the actual size of space unduly occupied by Vodafone to date, as only the latter knows when and where did these occupations take place, in breach of RPAO."[9]

Consequently, the dispute that opposes MEO to Vodafone does not integrate the regime of symmetrical regulation governed by DL No. 123/2009, as it arises from a conflict over the application of specific conditions set out in a Reference Offer imposed and regulated by ANACOM under and in compliance with ECL.

In this context, it must be concluded that the dispute under consideration cannot be examined in the framework of paragraph 7 of article 19 of DL No. 123/2009, as it is related to the alleged lack of compliance with conditions established in a regulated Reference Offer, which must be analysed - as explained above - under article 10 of ECL. This perspective is, moreover, in line with MEO's presentation, which begins by integrating its application for intervention in the scope of RPAO and article 10 of ECL.

3.2. Application for determination (with immediate effect)

Together with its application for dispute settlement, MEO also applies to ANACOM for:

a- An urgent intervention, under articles 63 and 64 of ECL, taking into account the clear breach of RPAO (and of DL No. 123/2009); and
b- An immediate «*determination*», to safeguard the period of time until the dispute at stake is finally settled, this application not being integrated in any legal provision.

As regards the provisions in articles 63 and 64 invoked by MEO for the purpose of an urgent intervention to be adopted by ANACOM in the scope of access[10] (and interconnection), it is stressed that point b) of paragraph 2 of article 63 refers to article 10, also of ECL, on the administrative dispute-settlement mechanism, for which ANACOM is

[9] It follows from Vodafone's communication of 16.11.2017, attached to MEO's application for intervention, that Vodafone sent to MEO requests for the installation of sleepers, which were rejected on grounds of its failure to submit customer drop installation requests.
[10] It should be noted that, under article 3 of ECL, "*access*" covers the "*access to physical infrastructures including buildings, ducts and poles*".

competent, at the request of any of the parties involved, to guarantee that regulatory objectives provided for in article 5 of the same Law are met.

In this regard, ANACOM believes that the application for determination with immediate effect must be analysed in the framework of possibilities of urgent intervention in a strict sense, under sector and general legislation, an exercise which is carried out below.

Urgent measures (article 9 of ECL)

The adoption of a measure of an immediate, proportionate and provisional nature by ANACOM, provided for in article 9 of ECL, is admitted, under exceptional circumstances, where urgent action, which must be duly substantiated, is required to safeguard competition and the interests of users. It is deemed that these are not the interests primarily under consideration here, bearing in mind, in fact, that MEO expressly claims reasons of integrity and safety of services provided in the suitable infrastructure concerned.

Interim measures (article 111 of ECL)

The application of article 111 of ECL - according to which ANACOM is entitled to determine interim measures - requires the existence of evidence of breach, with relevance to this matter, of specific conditions referred to in point a) of article 28 of that law, as regards access and interconnection matters, imposed on companies with SMP, in this case MEO. This does not seem to be the case, as results below from conclusions to the analysis of this dispute.

Interim measures (article 89 of APC)

Article 89 of the Administrative Procedure Code (APC) provides for a general regime of "*interim measures*", through the adoption of the respective administrative action, which does not require the prior hearing of the interested party (new paragraph 2 of article 89), and which is justified only in the light of the urgency underlying the respective adoption.

The major assumptions for taking a measure such as this are as follows:

i. To start, the respective "*necessity*", as only measures as may be necessary according to paragraph 1 of article referred provision are admitted, implying that the

measure is objectively adequate to the intended purpose, which is to safeguard the full effects of the action to be committed;

ii. The "*existence of a fair concern*" that, without such measures, a "*fait accompli or damages that are difficult to repair for public or private interests*" at stake, involved in the procedure (and not any other), arises: the so-called *periculum in mora*; and

iii. the "*weighting*" between the referred public and private interests at stake, so that damages resulting from the measure do not exceed those that were intended to be avoided with the respective adoption, also according to paragraph 1 of article 89 of APC (the so-called proportionality *stricto sensu*).

All things considered, this does not seem to be the case either. Let us see.

ANACOM admits the existence of the assumption of necessity, in the sense that the proposed measure seems to be appropriate to achieve the purpose desired by MEO.

Moreover, taking the likely evolution of the factual situation into account (i.e. "*forecasting the future perspectives of the evolution of the specific situation*"[11]), in the light of MEO's presentation, it is found that there is (economic) loss accounted for and demonstrated by this operator. However, this Authority has doubts that, without the adoption of the interim measure now requested, there would be a fait accompli or a damage that would be difficult to repair in case Vodafone, in fact, failed to immediately cease its current behaviour. On the contrary, it seems plausible that the situation is likely to be repaired through payment or settling of accounts and the appropriate record update by the Party complained against.

As regards the safeguard of the safety and integrity of services supported by MEO's suitable infrastructure (poles), resulting from the installation of customer drops by Vodafone, it is deemed that the installation of a customer drop does not involve a fibre or coaxial cable equivalent to the one used in the construction of an access network. In these situations, companies use a cable much smaller in diameter and size that the one used in the construction of an access network, comparable, for example, to a simple Ethernet cable. Consequently, the voltage on the pole due to the connection of this cable is insignificant, and in principle, no issues concerning the physical stability of the pole arise.

[11] According to Sandra Lopes Luís, *in* "*Comentários ao novo Código do Procedimento Administrativo*", AAFDL Editora, Vol. I, 2016, 3rd edition (page 745).

As such, at technical level, it is deemed that customer drops, for their specific characteristics, do not present a significant risk to the physical stability of poles on account of the type of connection and cables used in this operation. Moreover, since the entry into force of RPAO (in December 2010), ANACOM is not aware of any situation concerning the fall of any pole owned by MEO, resulting from the installation of a customer drop by beneficiaries of the offer. MEO has not identified, nor was it able to prove, the existence of an actual situation involving the fall of a pole as a result of the installation of a customer drop by a Beneficiary, in the scope of which the danger alleged by MEO resulted in specific and actual damage, nor which damage is concerned.

Moreover, according to point 4.2 of RPAO (version 3.1), "*The installation of customer drops established between the customer's building and a PL of the TAP, PDO or CD/PD type, does not require a prior viability analysis (…)*". The viability analysis service allows MEO to check the existence of conditions for the access and installation of cables and equipment of the Beneficiary in poles and associated infrastructure. As the analysis of prior viability in case of customer drop installation is not required, it is admitted that there are conditions, including safety conditions, for the access and installation of customer drops by Beneficiaries of the Offer, without prejudice to any field analysis by MEO's technical staff, entitled to monitor the installation of the drop concerned, if it so wishes.

Lastly, as regards the proportionality *stricto sensu*, having been made a weighing exercise that includes forecasts of future consequences, in similar terms as would be required for an application for a protective measure, it is considered that this assumption has not been met.

That is, having been weighted the damage that may arise now with the adoption of the interim measure, both for public interest and for specific private interests protected by law - in this case, for Vodafone - and damages that may result for other specific public and/or private interests protected by law if the measure is not adopted at this time - MEO claims that the integrity and safety of services provided over suitable infrastructure (poles) are at stake - it is not possible to conclude necessarily that damage resulting from the adoption of an interim measure are as strong or lower that damage that will arise if such measure is not adopted (namely, the protection of legal positions of the various actors that are covered by this measure, regarding whom MEO says nothing).

A different view could be taken in case (undue) access to and installations on poles - which MEO is not aware of - resulted in an overload thereof (which would be dangerous for the population). However, as explained above, from a technical point of view, this is not the case.

It should be noted, in this context, that, according to article 89 of APC, the provision "*the body (…) may order interim measures*", refers to an entitlement, indicating the power of discretion. As such, even if all the above-mentioned *de facto* assumptions for the application of the standard had been met - which, as explained, is not the case - the Authority would have the freedom to adopt, or not to adopt, a given interim measure.

4. Prior hearing of interested parties and application submitted by Vodafone

By determination of 21.06.2018, ANACOM's Management Board, in pursuing the tasks assigned under points a), b) c) and g) of paragraph 1 of article 8 of its Statutes, approved by Decree-Law No. 39/2015, of 16 March, in the exercise of powers provided for in point b) of paragraph 2 of article 9 of those same Statutes, as well as of competences provided for in article 10 of ECL, under point q) of paragraph 1 of article 26 of the Statutes, approved the draft decision (DD) on the "*Application for administrative dispute-settlement intervention - Non-compliance with customer drop procedures in the scope of the Reference Poles Access Offer*".

This draft decision was submitted to the prior hearing of interested parties, pursuant to and for the purpose of articles 121 and 122 of APC. Parties were duly notified[12], through letters[13] sent with acknowledgment of receipt, on 22.06.2018, and granted 10 (ten) working days to assess the matter.

During the period to exercise the prior hearing right, on 05.07.2018, Vodafone submitted an application to ANACOM, requesting the possibility to exercise its right to participation, specifically the right to adversarial procedure, without which the Authority would not be able, in its opinion, to make a judgment on the merits of the issue that was submitted to it under article 10 of ECL.

Immediately afterwards, on 09.07.2018, MEO and Vodafone presented, within the deadline fixed for the purpose, their comments on the draft decision, the right to the

[12] According to acknowledgement of receipts signed (by both companies) on 25.06.2018.
[13] With references ANACOM-S011809/2018 and ANACOM-S011811/2018.

prior hearing of each of the interested parties being considered to having been duly exercised, in the scope of this application for administrative dispute-settlement intervention, pursuant to and for the purpose of APC. As regards Vodafone's positon set out in the application presented to ANACOM on 05.07.2018, it must be stressed that it was the subject of a decision taken by this Authority on 19.07.2018[14] (included in an administrative file, to which reference is made as a whole), in which ANACOM concluded that it had not restricted the company's right to participation in the scope of the procedure for administrative dispute-settlement under consideration, nor had it failed to observe any provision laid down in the law in this scope.

In fact, having Vodafone presented its comments in a timely manner in the scope of the prior hearing, it was deemed that the interested party's right to be heard had been duly exercised, under the terms and for the purpose of APC. So much so, that Vodafone presents its position on the dispute and, although the company refers that it has done so in a brief and not thorough manner, the company assesses the draft decision issued by ANACOM, maintaining the essential content of its position, which the company itself had brought to ANACOM's notice.

The respective prior hearing report was drawn up - which is an integral part of this decision -, including a summary of comments received from MEO and Vodafone, and well as ANACOM's views on issues with relevance to the decision, and which substantiate the options taken at the end (reason why reference to its full text is made hereby).

It should be noted that additional measures were not requested by interested parties, nor documents were attached to the file, as admitted under APC.

Having been analysed the content of comments presented by both interested parties to the ongoing procedure, it is deemed that facts or elements were not presented so as to lead to an amendment to ANACOM's draft decision.

Accordingly, a final decision must now be taken.

[14] Notified to Vodafone through letter with reference ANACOM-S013010/2018.

5. Framework within RPAO in force (version 3.1)

In order to analyse the dispute, it is important to take account of the Reference Offer that is currently in force, version 3.1 of RPAO - bearing in mind ANACOM's decision of 29.06.2017, approving interim and urgent measures, regarding suspension of the entry into force of amendments to RDAO and RPAO introduced by MEO on 16.05.2017 and 30.05.2017, which took effect on 06.07.2017 (inclusively).

As such, the dispute under consideration must be analysed and decided in the light of current provisions set out in RPAO in its version 3.1, dated 30.06.2015[15]. A summary of the main provisions, which are of relevance to this case, is presented below.

Point 4.2 ("*Analysis of viability*") of RPAO provides as follows:

> "*The viability analysis service assesses the existence of conditions for the access and installation of cables and equipment of the Beneficiary in poles and associated infrastructure, in accordance with Annex 2.*
>
> (…) *The installation of customer drops established between the customer's building and a PL of the TAP, PDO or CD/PD type, installed on a pole owned by MEO, does not require a prior viability analysis, and must be requested in the scope of the intervention service."*

On its turn, point 4.4 ("*Intervention*") sets out that:

> "*The Beneficiary is responsible for supervising the appropriate functioning of cables and equipment that belong to it, that are installed on MEO's poles or infrastructure.*
>
> *Any intervention that must be carried out in the Beneficiary's cables and equipment that are installed on MEO's poles or associated infrastructure, namely to replace segments of malfunctioning cables or to install customer drops between the customer's building and a PL of the TAP, PDO or CD/PD type, installed on a pole owned by MEO, shall be carried out by the Beneficiary, who is required, for this purpose, to submit a specific intervention request, contacting MEO's operator call centre, according to procedures provided for in Annex 3*."

[15] Available at PT WholeSale's website: http://ptwholesale.pt/pt/servicos-nacionais/infraestruturas/Paginas/orap.aspx.

The referred Annex 3 of RPAO, that governs "*Request Management Procedures*", sets out in its point 7 that:

> "*The procedure supporting the intervention service in cables and equipment, installed in MEO's poles, consists of the request for intervention made by the Beneficiary, to repair or maintain cables and equipment, as well as to establish the customer's cable. This request is made over the telephone to MEO's operator call centre*."

Resuming, point 4.4 of the Offer sets out additionally that:

> "*The Beneficiary must submit to MEO information on the record of cables and equipment within at the most 30 calendar days, whenever a change in the settings of cables and equipment takes place, according to conditions set out in point* ***Error! Reference source not found.***"[16].

On the other hand, as regards Prices of services, regulated in point 7 of the body of RPAO, point 7.3 ("*Access and installation*"), in table 9 ("*Monthly price for the occupation of Poles and associated infrastructure*") sets out specifically that the "*monthly price for the occupation of an attachment by a cable on a Pole*" is 1.25€.

Table 9. Monthly price for the occupation of Poles and associated infrastructure

Occupation of Space	Price
Monthly price for the occupation of an attachment by a cable on a Pole	1.25€
Monthly price for the occupation of space on MEO's riser, per cable of the Beneficiary	0.60€
Monthly price for the occupation of space on MEO's pole, per riser of the Beneficiary	1.60€

To conclude this part, with regard to the monitoring and supervision of work, governed by point 7.6, RPAO determines that:

> "*MEO may provide the monitoring and supervision service to the following activities carried out by the Beneficiary: (…) (ii) installation of cables and equipment; (…) Prices of the monitoring and supervision service are those set out in table 10*."

[16] This "error" reference can be found in the publicly available RPAO version - however, it is deemed that MEO intends to refer to point 4.7 of that offer, which concerns records.

Table 10. Prices of the work monitoring and supervision service

Monitoring and Supervision	Price (2)
Normal schedule (Working days from 9am to 6 pm. Excludes Saturdays, Sundays, National Holidays and Municipal Holidays in the Municipality concerned) (1)	1st hour - 39.40€ Following hours - 23.50€ Accumulated maximum - 120.00€
Other periods	1st hour - 61.40€ Following hours - 43.10€ Accumulated maximum - 205.00€

The appropriate frameworks having been presented - at procedural level and at the level of the Reference Offer in force - it is now necessary to perform the substantive analysis of the dispute.

6. Analysis of the dispute

The substantive analysis of this dispute is performed in the following perspectives: on the one hand, with regard to procedures to be followed in the scope of the installation of customer drops and subsequent submission of records and, on the other, with regards to payments associated to customer drops that are required from Beneficiaries of the Offer.

6.1. Customer drop installation procedures

According to version 3.1 of RPAO, the procedure for the submission of customer drop installation request falls within the scope of the intervention service (according to point 4.4 reproduced above). As such, contrary to Vodafone's claims that version 3.1 of RPAO bears a gap, it can be said, first and foremost, that the Offer clearly and expressly provides that, for the purpose of the installation of customer drops by Beneficiaries, the latter are required to submit to MEO a (prior) intervention request, under Annex 3.

As regards specific procedures established by MEO, with took effect on 15.10.2015, concerning the installation of customer drops - which include a specific email and a template for the submission of requests, as well as the definition of a schedule from 9am to 6pm on working days for submission purposes -, they never integrated version 3.1 of RPAO, thus ANACOM takes the view that their adoption by Beneficiaries, including Vodafone, was optional and voluntary.

From the chart made available by MEO in its application, which includes the "*Monthly evolution of customer drop intervention requests*" in the scope of RPAO from Vodafone, since the beginning of 2016, it is possible to observe that the Party complained against submitted requests up to August 2017, month on which a sharp decrease of requests is registered. In fact, in July 2017 Vodafone submitted 1315 requests and, in August 2017, only 121 requests were submitted.

Vodafone substantiates its position to having ceased to submit requests for intervention to MEO for the customer drop installation in the scope of RPAO (a position which was also voluntarily taken), alleging determinations taken by ANACOM itself, included both in the review of Markets 3a and 3b, and in ANACOM's decision of 29.06.2017, on the suspension of amendments to RPAO introduced by MEO.

In the context of the review of Markets 3a and 3b, ANACOM refers as follows, in the Report[17] of public consultation and prior hearing procedures on the respective draft decision, dated 11.02.2016:

"(…) in the very specific case of customer drop installations that only involve a pole owned by MEO (which is the case of most installations), it is deemed that the RPAO Beneficiary is duly qualified (insofar as the work is carried out by installers certified by MEO itself) to carry out such work without any risks for the safety of property and life, reason for which a prior scheduling with MEO it is not deemed to be compulsory, provided that the RPAO Beneficiary sends a notification at a very short notice (…)" (emphasis added).

It must be acknowledged that, in the above-mentioned report, this Authority did not consider the prior scheduling with MEO to be mandatory, in the case of customer drop installations involving only a pole, although it did consider that the RPAO Beneficiary should send a prior notification, even at a very short notice, to allow the beginning of customer drop installation work by the Beneficiary. Notwithstanding, it must also be clarified that this understanding was transmitted in a non-prescriptive forum, that is, in the scope of a prior hearing report.

[17] Available at ANACOM's website at: https://www.anacom.pt/streaming/relamerc3a_3b.pdf?contentId=1389743&field=ATTACHED_FILE (page 173).

In fact, in the respective final decision, ANACOM considered it to be proportional that wholesale services associated with the provision by MEO of access to ducts ensured a standard equivalence of input (EoI), the appropriate amendment of RDAO and RPAO having been imposed on MEO, within 30 days from the respective notification.

It was also recommended in that Decision that amendments to be made by MEO to Reference Offers went in the direction of proposals presented by the company in its response to the prior hearing and public consultation on the respective draft decision, taking into account, *inter alia*, ANACOM's preliminary position, set out in the prior hearing report, on the procedure for installation in RDAO and for installation of customer drops in RPAO.

As such, Vodafone refers to ANACOM's market review to substantiate that it is not necessary to submit a prior customer drop installation request in the scope of RPAO, but omits the fact that this Authority took the view in the respective public consultation Report that this lack of need refers only to customer drops that involve a single MEO pole, in which case it would suffice for the Beneficiary of RPAO to submit to MEO "*a notification at a very short notice*" - thus a prior notification - and omits, furthermore, that there was no imposition on ANACOM's part in this direction, only a recommendation.

It is in this specific context that MEO made amendments to Reference Offers, having published, on 16.05.2017 and on 30.05.2017, new versions of RPAO (4.0 and 5.0, respectively), not having included therein ANACOM's recommendation on customer drop installations in the scope of RPAO. Without prejudice to MEO's grounds for amendments introduced to RPAO, further to requests presented by Beneficiaries of the Offer (namely Vodafone and NOS), ANACOM, by decision of 29.06.2017, suspended the referred versions 4.0 and 5.0 of RPAO, with effect as from 06.07.2017, and maintained version 3.1 of RPAO in force, in the scope of which, it is recalled, the procedure for requesting customer drop installation is covered by the intervention service - thus there is no doubt that this is the version of RPAO that is currently in force.

It must be clarified that, in its decision suspending new versions of RPAO, this Authority took the following view, especially as regards MEO's inclusion in RPAO of the description of conditions of the customer drop installation service, as well as of associated operational procedures:

"*Although it is considered, in principle, that this amendment has an immediate negative impact, as it is fails to be in line with ANACOM's recommendation, namely to bring the offer closer to the EoI principle, it is also deemed that this matter requires a more detailed assessment, to be undertaken in the scope of the ongoing review*." (emphasis added).

In fact, the matter under consideration is being dealt with in the appropriate forum, that is, in the scope of the review/amendment of RDAO and RPAO, the draft decision (DD) of which was approved on 25.05.2018, and submitted to the applicable consultation procedures under the law. This review covers, specifically, the analysis of procedures related to requests (or notifications) for installation of customer drops[18]. However, it is emphasised, no amendment to version 3.1 of RPAO has taken effect so far, thus it remains, as referred above, fully in force.

As such, this Authority takes the view that there is no reason why Vodafone should not abide by the procedure related to intervention requests for customer drop installation, as provided for in version 3.1 of the Offer.

In fact, Vodafone decided unilaterally to cease to comply with provisions set out in the Offer as regards the installation of customer drops, based on a misinterpretation of the (legal) value of this Authority's views in its report of the public consultation on the review of Markets 3a and 3b and in the decision suspending amendments to RPAO.

It is recalled that this Authority's position on the lack of need for a prior scheduling of installations with MEO, in the case of customer drop installations that involve a single pole, consisted merely of a recommendation made in the scope of a market review, that was not adopted by RPAO, reason why that position has not (yet) been imposed. And it follows from ANACOM's decision suspending amendments to RPAO, without any uncertainty, that the RPAO version currently in force in version 3.1, which will remain in force until the next version of the Offer, resulting from ANACOM's final decision on amendments to RPAO, takes effect. As referred earlier, the DD of such decision has already been approved and submitted to the legally applicable consultation procedures, with an impact beyond parties to this dispute.

[18] *Vide* section 2.2.5 "*Customer drop installation in RPAO*" of the referred draft decision.

As regards Vodafone's claim (raised in its communication of 16.11.2017), that the requirement introduced by MEO at the time of its change of management in December 2015, to receive a request from beneficiaries for the installation of a customer drop, is not admissible, as it fails to comply with ANACOM's determinations, among other aspects, in the part that such determinations were intended to implement the principle of equivalence of inputs, it must be stressed that this fails to make any sense, as the referred procedure was presented by MEO in 2015, and the principle of equivalence of inputs was determined by ANACOM in the scope of the review of markets 3a and 3b, and published in March 2017.

Moreover, Vodafone is mistaken when it mentions that, in the scope of the initial version of RPAO, MEO never required a request for customer drop installation, given that, in fact the Offer - always - set out that "*The installation of customer drops established between the customer's building and a PL of the TAP, PDO or CD/PD type, installed on a pole owned by PTC* [now MEO]*, does not require a prior viability analysis, and must be requested in the scope of the intervention service."*

This means that the intervention service was *ab initio* subject to the requirement for an explicit request (for intervention) from Beneficiaries, as well as for the submission of the register further to the conclusion of the respective work. Vodafone itself refers the substantial amendment of procedures on the part of MEO to the new version of RPAO, which is identified - certainly due to an oversight - as version 4.1, which never existed (on the contrary, new versions, which were suspended in the meantime by ANACOM, were numbered 4.0 and 5.0, as referred earlier).

In this line, it is also stressed that claims presented by Vodafone are not accepted as regards the record issue. It must be noted that, since the entry into force of RPAO in 2010, this Offer was only amended by this Authority, by decision of 19.09.2013, as regards the limit for accounting for the penalty on Beneficiaries for failing to comply with the timeliness of the submission of record information. Is it deemed, as such, that Vodafone must provide to MEO information on all customer drops installed on MEO's poles, from August 2017 to date, identifying them properly in the record, in compliance with point 4.4 of RPAO, version 3.1 in force.

As regards the claim that there is a discriminatory treatment on the part of MEO compared to other Beneficiaries, it is important to highlight that Vodafone merely alleges, in a general fashion, that "*as far as the market is aware - none of the other beneficiaries of RPAO has abided by the procedure launched by MEO in October 2015, thus any lack of diligence on the part of MEO to impose its application of such operators represents a serious discriminatory treatment of Vodafone*." This company does not substantiate these allegations of discrimination against itself on the part of MEO, as regards the procedure for customer drop installation in the scope of RPAO. Although there may be situations of non-compliance on the part of other Beneficiaries of the Offer with respect to procedures for customer drop installation, there seems not to exist, in principle, a discriminatory behaviour on the part of MEO towards the Party complained against.

In this context, it should be stressed that ANACOM was made aware by MEO itself of the existence of situations concerning procedures for customer drop installation by other Beneficiaries of this Offer, who have been urged by MEO to rectify installations carried out in breach of conditions set out in RPAO, thus there seems not to exist, in principle, a discriminatory behaviour on the part of MEO towards the Party complained against.

As regards MEO's decisions, challenged by Vodafone, to reject the installation of sleepers in its poles, following Vodafone's requests for that purpose, it is deemed that such decisions are duly justified, given that such sleepers, to be installed by MEO, would be intended to support customer drops which Vodafone installed, as explained above, in breach of procedures provided for in version 3.1 of the RPAO in force.

Finally, it must be referred that the information conveyed by Vodafone to ANACOM through the communication sent by email on 15.03.2018, specifically in document No.3 (that is, the email dated 07.03.2018, from the Municipal Council of **[BCI] [ECI]** to Vodafone) is not deemed to be relevant for the procedure under consideration, as the issue at stake in that forum concerns only RDAO (that is, access to ducts), not the access to MEO's poles, which covers the customer drop issue.

6.2. Payments related to customer drops

With regards to payments related to customer drops, it is deemed that, given that the installation of a customer drop consists of the attachment of a cable in one or more poles owned by MEO, the Beneficiary was always required to pay MEO a monthly amount for

the occupation of a cable attachment on a pole. The price that applies for this purpose is provided for in table 9, point 7.3 of the Offer (i.e., 1.25€).

RPAO also sets out that, in case MEO undertakes the monitoring/supervision of the customer drop installation, the Beneficiary is required to pay the corresponding price for the monitoring and supervision of works, according to table 10 of section 7.6 of the Offer.

According to MEO, Vodafone has continued since August 2017 to install customer drops in the scope of RPAO, failing however to make the corresponding payments of amounts due for the occupation of associated poles. Moreover, as MEO has not received from Vodafone any requests for intervention aiming for the installation of customer drops, it was not aware of such installations, being prevented from performing any monitoring or supervision exercises, and consequently from charging the respective amounts.

Given that there have been no amendments introduced to version 3.1 of RPAO, without prejudice to the DD approved on 25.05.2018 focusing on amendments to RDAO and RPAO, the public consultation procedure of which is ongoing, it is deemed that there are no grounds why Vodafone should have ceased unilaterally from making the payment of values due for the occupation of MEO's poles, related to customer drops that were installed, contrary to the behaviour adopted voluntarily, up to the end of July/beginning of August of 2017.

7. Decision

In the light of the above, in pursuing the tasks provided for in points a), b, c, and g) of paragraph 1 of article 8 of its Statutes, approved by Decree-Law No. 39/2015, of 16 March, in the exercise of powers provided for in point b) of paragraph 2 of article 9 of the same Statutes as well as competences provided for in article 10 of ECL, the Management Board, under point q) of paragraph 1 of article 26 of the Statutes, hereby decides to order Vodafone to comply immediately with provisions in version 3.1 of RPAO, in force, with regard to procedures concerning the installation of customer drops, putting an end to the current practice, being required, as a consequence, to:

a) Submit to MEO customer drop installation requests in the scope of the intervention service;

b) Inform MEO of all customer drops installed from the August 2017 to date, identifying them properly in the information record; and

c) Make the payments of amounts that concern the occupation of MEO poles related to customer drops.

Lisbon, 2 August 2018.