# Decision

## Request to intervene made by MEO for the administrative resolution of its dispute with NOS regarding the rate for mobile-to-mobile call termination services reciprocally provided in 2001 between TMN and OPTIMUS

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## 1. MEO request

On 31.07.2018, a letter was received by ANACOM from MEO – Serviços de Comunicações e Multimédia, SA (MEO) – which succeeded TMN – Telecomunicações Móveis Nacionais, SA (TMN) – dated 30.07.2019, having reference number CCO079, in which, under the terms and for the purposes of Article 10 of Law 5/2004, of 10 February, in its current wording ("Electronic Communications Law" or "ECL") – or, alternatively, under its legal powers as the regulatory authority of the sector – that company asked ANACOM to intervene in fixing the rate to be applied in 2001 for termination services reciprocally provided by the then TMN and the then OPTIMUS Telecomunicações, SA (OPTIMUS, currently NOS Comunicações, SA, hereinafter referred to as OPTIMUS, SONAECOM or NOS).

The company further asked for *"the rate of Esc. 55.00 (€ 0.2743) per minute + VAT to be established for the mobile-to-mobile termination services reciprocally provided between TMN and OPTIMUS in 2001".*

MEO justifies the request it submitted, as of the current time, under the terms summarised below.

The company starts by mentioning that OPTIMUS/NOS does not agree with its proposal that the termination rate to be applied in 2001 should amount to 55.00 PTE/minute, believing that the rate should be established at 25.82 PTE (€ 0.1287)[1].

MEO recalls the ANACOM decision of 24.01.2002, *"not to intervene in the resolution of the ongoing dispute between TMN and Optimus, in view of the pending legal action on the matter"*[2] and stresses that it has always opposed the idea that only ANACOM had the necessary powers to determine the rate due for mobile-to-mobile call termination services for 2001 between TMN and OPTIMUS, stating that it was in favour of the courts analysing and deciding the rate to be charged between these companies, which, it notes, they did not manage to do.

It states that TMN and OPTIMUS were involved in two actions from 10.10.2001 until 24.04.2018 (now as MEO and NOS, respectively), resulting in the courts failing to agree to establish a rate, and the parties subsequently failing to arrive at an agreement, as a result of which it believes that the only remaining alternative is to ask ANACOM to intervene in order

[1] OPTIMUS' position results, MEO believes, from the exhibit that the company presented to ANACOM on 06.11.2001, in which it asked ANACOM to intervene to establish the aforementioned rate of 25.82 PTE (€ 0.1287).
[2] Emphasis added by the author.

to establish, for 2001, the rate for the mobile-to-mobile termination service to be reciprocally charged by the parties, within a context it believes is “inevitable”.

In fact, when reviewing the judicial litigation between TMN and OPTIMUS – which is summarised in point 4. below – MEO states that the various judicial bodies that judged the first legal claim (Proceeding no. 723/2001) refused to establish a rate, considering that the competence for that purpose fell to ANACOM and, under the second legal claim (Proceeding no. 524/10.1/TVLSB), despite having systematically argued that it would be up to the court to rule on the issue of the rate, setting it, in the absence of an agreement, a judgment was handed down that considered the action brought by OPTIMUS to be valid. This decision mentions [only] the following passage: “[r]*eferring* [in Proceeding no. 723/2001] *such a question* [pricing] *to ICP-Anacom, which incidentally is responsible for resolving these disputes (according to the provisions of Articles 16 and 18 of DL 415/98 and 309/2001 of 7/12), which was asked to intervene in this field, this is the body that will be responsible for establishing the aforementioned rate”.*

Against this background, MEO concludes that, although it disagrees with the rationale of the judicial courts, it is an inescapable fact that, all the procedurally permissible options for reversing the judicial decisions handed down having been exhausted, it is therefore forced to appeal to ANACOM for the purpose of establishing a rate for the interconnection services reciprocally provided by TMN and OPTIMUS in 2001.

That said, MEO sets out its understanding of the legal context that it considers justifies and enables ANACOM’s intervention in resolving the litigation as requested herein, stressing that, despite it being the case that the facts relate to 2001, only with effect from the date on which the last decision handed down became final, under the 2nd legal claim (which it claims took place on 24.04.2018), has it become *"possible for ANACOM to resolve the dispute between the parties"*.

As for the rates to be charged, MEO points out that it is an undisputed fact that TMN and OPTIMUS reciprocally provided mobile-to-mobile termination services during 2001, and that this had been the case since 1998, as they are costly services.

MEO understands that, regardless of the existence, or not, of an agreement, the rate of 55.00 PTE/minute + VAT is the only one that may apply to the year 2001, given that:

a. this was the rate that was charged between TMN and OPTIMUS in the immediately preceding quarter (fourth quarter of 2000);

b. it was the rate that was charged, reciprocally, between TMN and VODAFONE from the last quarter of 2000 and during 2001;

c. it was the rate reciprocally charged between OPTIMUS and VODAFONE in the years 2000 and 2001.

It also adds that, given that TMN and VODAFONE were declared to have significant market power (SMP) in the markets for mobile telephone networks and services, they were obliged to respect the principle of non-discrimination in the provision of termination of mobile services, as a result of which they could not charge discriminatory termination rates.

It notes that OPTIMUS was well aware of the obligation of non-discrimination between operators to which TMN was bound, since it used this same principle to demand the rectification of the rate charged by TMN for interconnection services for 1999 and 2000.

MEO also recalls that ANACOM, under its Decision of 24.01.2002, made several references to the principle of non-discrimination, and that it decided the request for intervention submitted to it by Onitelecom – Infocomunicações SA (ONI) – due to a lack of agreement between that fixed network operator and mobile operators regarding the termination rate for the year 2001 – establishing that the rate should be identical to that which was charged in relation to the other operators.

MEO also alludes to the provisions of Article 1158 of the Civil Code, applicable to the contract for services pursuant to Article 1154 of the same Code, which establishes that, where the mandate is costly, the measure of remuneration, where adjustments are not made between the parties, shall be determined by professional fees, in the absence of these, by practices and, in the absence of both, by judgments of fairness. To this effect, it considers that 55.00 PTE represented a value that corresponded to the professional fees and usage of the profession, as this is the rate that, from 2000 and until the end of 2001, had been charged, reciprocally, between the mobile operators.

It also argues that the rate of 55.00 PTE for mobile-to-mobile termination (which it says is traditionally the highest of the termination rates) was quite close to the value determined by ANACOM in 2000 for the average fixed-to-mobile termination rate (47.50 PTE/minute/€

0.2369) to be charged by all mobile operators. It stresses that, in 2001, there were no reasons to justify the existence of substantial differences between the rate for fixed-to-mobile termination and that of mobile-to-mobile termination, as mentioned in the ANACOM Decision of 29.05.2002 on mobile-to-mobile termination.

MEO therefore understands that the rate proposed by OPTIMUS (25.82 PTE) for termination with TMN is unreasonable, it making no sense in light of the rates charged in 2001, nor the applicable legal and regulatory framework, nor in light of the rate that OPTIMUS agreed with VODAFONE for 2000 and 2001, which was € 0.2743 (55.00 PTE), nor in light of the rate agreed with VODAFONE for 2002, of € 0.1870 (37.49 PTE), nor the rate it proposed to TMN for 2002, also € 0.1870 (which was not accepted).

MEO also states that the rate of 25.82 PTE is also not in line with the criteria for establishing mobile-to-mobile termination rates that ANACOM set for 2002, within the scope of its Decision of 29.05.2002 (€ 0.2070 [41.50 PTE] per minute, for a call of 100 seconds in duration, with charges per second, at a maximum from the first minute and € 0.1870 [37.50 PTE] per minute, with charges per second from the first second, for application, respectively, with effect from 01.01.2002 and 30.06.2002).

In short, MEO requests ANACOM's intervention in establishing the rate to be applied to the termination services reciprocally provided by TMN and OPTIMUS in 2001, at 55.00 PTE/minute + VAT (€ 0.2743).

## 2. NOS representation

Following the request for intervention submitted by MEO, ANACOM notified[3] NOS that, if it so wished, it could make representations, in writing, within 15 working days, on the request submitted.

In response, NOS[4] made representations to the effect that MEO is wrong regarding all the issues it raises in its application, i.e. in terms of its justifications for only asking ANACOM to intervene to resolve the dispute regarding the rate for interconnection services provided in 2001 between OPTIMUS and TMN by means of the letter dated 30.07.2018, and regarding

[3] Through official letter with the ref. no. ANACOM-S004149/2019, dated 06.03.2019.
[4] Letter dated 28.03.2019, received on 29.03.2019.

the rationale it uses to justify that the rate for interconnection services provided between the companies in 2001 should be set at 55.00 PTE (€ 0.2743) per minute, plus VAT.

NOS organises its representation into the three parts, which are summarised below:

*(i)* *The untimeliness of the request made by MEO*

NOS does not contest that ANACOM has exclusive competence to determine the rate for interconnection services between mobile operators, in the event that they fail to reach an agreement. However, according to the company, since the request to intervene is legally subject to a deadline, which has not been respected, the right to claim this intervention has lapsed.

By reference to the previous law[5], in force in 2001, and to the current law (Electronic Communications Law), NOS states that the intervention of ANACOM for the purpose of resolving conflicts between operators resulting from a lack of agreement on the rate for interconnection services is dependent on a request from the interested parties, which must be made within a certain period, which was 60 days from the date of knowledge of the fact that gave rise to the dispute, under the old law, and became 1 year from the date of the beginning of the dispute, under the law currently in force.

The company recalls that, there being no agreement with TMN for 2001, particularly with regard to price, it asked ANACOM to intervene on 06.11.2001. It also recalls that TMN was opposed to the intervention of this Authority, alleging the existence of an agreement and that ANACOM, by resolution of its Board of Directors adopted on 24.01.2002, decided not to intervene, as a legal claim[6] was at that time being heard, which discussed the existence of a price agreement.

For NOS, once the judgment issued under Proceeding no. 723/2001 became final, it became certain that there was no agreement on the interconnection price for 2001 between OPTIMUS and TMN, and so ANACOM would be needed to establish that price, at the request of one of the parties.

[5] Decree-Law. 415/98, of 31 December.
[6] MEO states that this is Proceeding no. 723/2001, filed by TMN against Optimus, which ran its course at the Judicial Court of Maia.

According to the company, if it so wished, TMN (or PT Comunicações, SA (PTC), if it had legitimacy to do so) could have triggered the dispute settlement procedure provided for under the Electronic Communications Law, in which case it would have had, for the purpose, a period of one year after that decision had become final (or 60 days, if Decree-Law 415/98, of 31 December, was deemed applicable).

Granting that it would not have had to do so before, as the claim was still pending, NOS understands that, once a judgment opposed by both TMN and PTC had become final, there was no agreement on the interconnection pricing for 2001 and that it was up to ANACOM to establish that price at the request of either of the parties. It was therefore necessary for TMN, if it so wished and within the legal period, to ask this Authority to intervene to resolve the dispute – which the company failed to do.

NOS also mentions that the undertaking that the dispute concerned, being a party in the interconnection relationship to which the lack of agreement related, was TMN, which, in 2010, was a company separate from PTC. Furthermore, it states that TMN was not a party, at any time, to the Proceeding that ran its course under the no. 524/10.1TVLSB, this claim being brought by NOS exclusively against PTC. The purpose of the claim was to collect debts from OPTIMUS (which had been merged into SONAECOM), on behalf of PTC, relating to balances resulting from the reciprocal provision of interconnection services.

Only in 2014, when the lawsuit had been pending for 4 years, was TMN absorbed by PTC, currently MEO.

For NOS, Proceeding no. 524/10.1TVLSB was something unconnected to TMN, as a result of which TMN's decision, made in 2010, after the sentence handed down under Proceeding no. 723/2001 had become final, not to ask ANACOM to intervene to establish the interconnection pricing for 2001, could never have been justified by the fact that the second claim filed (Proceeding no. 524/10.1TVLSB) remained pending. The company argues that, if TMN decided to wait for the outcome of this claim, it did so at its own risk, as it was not a party to the claim, nor did the concern TMN.

NOS adds that it is untrue that the subject matter of Proceeding no. 524/10TVLSB included the pricing of interconnection services reciprocally provided between OPTIMUS and TMN relating to 2001, since in the case in question, a request was made to order PTC to pay the

claims that OPTIMUS held against it, which said company argued had cancelled out by TMN's alleged claims against OPTIMUS, which would have been transferred to it.

According to NOS, "*MEO wants to create confusion between the two claims, but what it says is not true. From the outset, OPTIMUS' alleged alternative between the pricing request and the filing of a claim against PTC and TMN with a view to declaring the transfers of claims between these two companies null and void is false, indeed absurd, and it is above all false to suggest that what SONAECOM did was to propose such an action.*"

NOS believes that *"what SONAECOM did, after becoming certain that there was no agreement on interconnection pricing between OPTIMUS and TMN for 2001 that could justify the offsetting performed by PTC, was to bring an action against PTC (and only against PTC) demanding the payment of the amounts owed to OPTIMUS, in which the question of the ineffectiveness of the compensation statements ended up being discussed because of the defence presented by PTC"*[7].

NOS further claims that it is untrue that it was under Proceeding no. 524/10.1TVLS that the courts decided that they did not have the power to establish the interconnection price; they did so, according to the company, under the first claim, with decision made final in 2010, and in the second proceeding, they simply refrained from making a new pronouncement on the issue, recognising the authority of the res judicata formed under Proceeding no. 723/2001.

In short, for NOS, in the year following the final judgment of the sentence handed down under Proceeding no. 723/2001 – i.e. after 8 February 2010 – TMN could have asked ANACOM to intervene to resolve the dispute with OPTIMUS.

Therefore, **for the company today, the periods that TMN had in which to call upon ANACOM to intervene must be considered to have definitively lapsed**, either in the light of the provisions of Article 18 (2) of Decree-Law 415/98, of 31 December, or Article 10 (2) of the current Electronic Communications Law and, consequently, the right of MEO to obtain from ANACOM the pricing of the interconnection between OPTIMUS and TMN in relation to the year 2001 has expired.

[7] Emphasis added by the author.

NOS also argues that MEO's interpretation of the word "may" as used in Article 11 (1) of the Electronic Communications Law has no basis. For the company, where, in Article 11 (1), it is established that *"The NRA may only refuse a request for resolution of a dispute formulated under the terms of the preceding article in the following cases"* – among which is the elapsing of the time frame of Article 10 (2) – what the law seeks to do with the use of the word "may" is to unambiguously restrict the grounds for refusing to resolve a dispute to the situations described therein – basically, it is saying that only in these situations, and not in any other, will the request made by any of the parties to the dispute fail to give rise to the intervention of the Regulatory Authority. For NOS, it is clearly not a purpose of the law to establish that, in situations that it constitutes as a ground for refusal, there is scope for discretion by the Regulatory Authority that may lead it to intervene in cases where the time frame has already elapsed, and not in others, depending on its weighting.

According to the company, where any of the subdivisions of Article 11 (1) of the ECL has been satisfied, ANACOM is prevented from intervening in the resolution of the conflict – that is the only reasonable meaning that may be attached to this rule.

NOS is not convinced by the argument concerning MEO's alleged lack of authority in the absence of intervention by ANACOM, nor can it serve as a justification for the attribution, contrary to the law, of alleged unofficial powers of initiative to ANACOM. In the company's view, the right of access to justice and effective judicial protection is consistent with the definition, by law, of rules and procedures by which this can and should be exercised, including the definition of reasonable periods for the commission of acts by individuals.

The company states that the alleged lack of protection of MEO's claim, if it is not assessed by ANACOM, is no different from any other situation in which those who do not exercise a right within the period available to them find themselves, and, for that reason, it has to bear, in terms of self-responsibility, the disadvantageous consequences of non-observance of that burden.

NOS also adds that an intervention by ANACOM that took place *"today"* in relation to the 2001 interconnection pricing could certainly no longer be intended to be beneficial and effective, from the standpoint of promoting the interests of users, combating the establishment of barriers to end-users taking advantage of network externalities or the promotion of innovative market offers, for example – it is clear that what remains to be satisfied is the (particular) interest of the operators involved in setting the rate for the service

and in carrying out the corresponding settlement of accounts. However, for NOS, this particular interest cannot justify an exceptional intervention by ANACOM, such as that proposed by MEO, in the resolution of a dispute that was not requested in due time.

*(ii) The rate of 55.00 PTE per minute + VAT demanded by MEO for the 2001 interconnection services*

NOS also presents the reasons why it considers that the price advocated by MEO for the reciprocal provision of termination services between OPTIMUS and TMN, in 2001 – 55.00 PTE (€ 0.2743) per minute + VAT – is untenable.

Thus, with respect to the fact that, between TMN and OPTIMUS, a rate of 55.00 PTE per minute was charged in the 4th quarter of 2000, NOS acknowledges that, for that year 2000, the company initially accepted, both in relation to TMN and in relation to VODAFONE, a rate of 55.00 PTE per minute + VAT – albeit, with both companies, this price ended up being subject to substantial reductions in the period from January to September, with a rate of 4.27 PTE per minute + VAT being charged between OPTIMUS and TMN from January to March, and a rate of 22.00 PTE per minute + VAT, from April to September. NOS adds that this price was set due to very special reasons, which it recalls in its representation (paragraphs 79 to 86, to which reference is made).

The company claims that the rate of 55.00 PTE per minute thus ended up being charged in the relationship between OPTIMUS and TMN and between OPTIMUS and VODAFONE only in the last quarter of 2000, and due to a very special and unique situation – which means that this price cannot be used as a reference for the pricing of interconnection services for 2001.

It also argues that the lack of professional fees between operators in this interconnection sector is something that has already been recognised by the Courts, in the proceedings referred to by MEO, it being understood that there is no need for discussion[8] concerning this aspect – as a result of which, it does not understand MEO's insistence.

Furthermore, for NOS, it is also untrue that the rate of 55.00 PTE per minute resulted from the *practices of the profession*, i.e. that among operators there were repeated behaviours or practices, reflected in the generalised and uniform application of a rate of 55.00 PTE per

[8] See unproven fact no. 3 from the judgment issued in Proceeding no. 524/10.1TVLS (Document no. 10, attached to the MEO application).

minute – the Court having also denied that the rate of 55.00 PTE per minute + VAT corresponds to the practices of the profession in relations between operators[9].

NOS therefore rejects that a rate of 55.00 PTE per minute + VAT would be a value charged among the operators, or that would correspond to the *practices of the sector* in 2001.

The company also adds that the fact that, between TMN and VODAFONE, this price was maintained for 2001 resulted from there being no imbalance between those operators, and they are therefore indifferent to maintaining a very high price, in addition to the fact that they could continue to enjoy the benefits of such an abnormally high value from the standpoint of increased turnover. NOS believes that the situation changed, precisely in 2001, to the detriment of VODAFONE, as this is, in its opinion, the most plausible explanation for the fact that TMN and VODAFONE failed to reach agreement regarding the price to be charged in 2002, which resulted in ANACOM being required to intervene.

As for the conditions that prevailed between OPTIMUS and VODAFONE in 2001, it understands that what happened was that, despite the fact that invoices were initially issued that took the rate of 55.00 PTE per minute as a reference, even in 2000, the companies issued adjustments that reduced the price to 22.00 PTE per minute. And the two companies ended up reaching an understanding that the remuneration conditions related to the interconnection between their networks in 2001 would be those that would be applicable to the relations between TMN and OPTIMUS, as a result of which the accounts between OPTIMUS and VODAFONE concerning interconnection related to 2001 ended up not being reconciled – which explains, moreover, why VODAFONE never asked OPTIMUS to pay the balances, calculated in its favour, with reference to the aforementioned period, based on a rate of 55.00 PTE per minute + VAT, or any other amount. NOS points out that, contrary to that which MEO claimed, not only was the rate of 55.00 PTE per minute not *"charged by all mobile operators from the last quarter of 2000 and in the year 2001"*, it also ended up being charged only between TMN and VODAFONE in the year 2001.

With regard to the non-discrimination argument, NOS regrets that, after all these years of unsuccessfully brandishing it in the Courts, MEO has not yet dropped it, such is – in NOS' opinion – its lack of foundation.

[9] See unproven fact no. 4 from the judgment issued under Proceeding no. 524/10.1TVLSB (Document no. 10, attached to the MEO application).

It is true that, in 2001, both TMN and VODAFONE had the status of companies holding SMP in the markets for mobile telephone networks and services and, therefore, were bound to observe the *"principle of non-discrimination in providing interconnection"* (see Article 8 (1) (a) of Decree-Law 415/98). However, for NOS, the consequence that MEO wants to derive from it is unacceptable: that, *"having regard to the aforementioned principle of non-discrimination applicable to TMN, it could only charge, in relation to OPTIMUS, in 2001, the same mobile-to-mobile termination price that it charged (and paid) VODAFONE, i.e. 55.00 PTE (€ 0.2743) per minute + VAT, which was also, in turn, the price that OPTIMUS and VODAFONE charged each other".*

NOS also alludes to MEO's argument that, ANACOM having determined, in the decision of 24.01.2002, that the prices for interconnection services of terrestrial mobile service operators contained in the interconnection agreements and which were already in force at the end of 2000 should be charged to ONI, in 2001, there would be no reason to think that it would have set a different price if it had known about OPTIMUS' request from the outset. For NOS, this is a speculative statement about what ANACOM's decision might have been, which is not based on any factual grounds.

More decisive for NOS is that the intervention requested by MEO from ANACOM is not that of fixing the termination rate for 2001, as if we were in 2001 or 2002, but rather the fixing of that rate in 2019. For NOS, what needs to be ascertained, with the information available *"today"* and bearing in mind that, at the present time, a rate is being established for a service provided in 2001, is what that rate should be. For the company, if ANACOM were to set the rate for 2001 now, it would be able to consider a range of facts and information that would not have been considered in 2002 – such as the fact that the rates that were effectively adopted and charged between the three mobile operators in 2000 were not 55.00 PTE per minute, but much lower, and this figure was in force only in the last quarter of that year, for very special and unique reasons. For NOS, the consideration of these facts and information necessarily leads to the conclusion that the rate of 55.00 PTE per minute + VAT is excessive and unjustified.

Regarding the fact that the average rate for the fixed-mobile termination service was established, by a determination dated 03.08.2000, at 47.50 PTE per minute, it argues that this first intervention by ANACOM at that rate was based on a number of concerns related to the maintenance an important source of revenue for mobile operators, which led to a rate that was recognised as being high, and a delay in the convergence that was sought

with the price of mobile-mobile termination. For NOS, with respect to the matter at hand, similar concerns no longer existed. On the contrary, the rates that were being charged among the operators was much lower – excluding the rate that ended up in force between operators in the last quarter of 2000 (and that remained in force between TMN and VODAFONE for 2001 as well), the justification of which lay in the aforementioned fear that said operators would be faced with a fixed-mobile termination rate that would result in an abrupt loss of revenues.

Finally, NOS states that MEO invokes the fact that, by a determination dated 29.05.2002, ANACOM set, for 2002, rates[10] of € 0.2070 for the first half and € 0.1870 for the second half, this with charging per second from the first minute. The prices in question are significantly lower than the 55.00 PTE per minute defended by MEO, as a result of which NOS does not see how its claim can be supported.

In any case, understanding that the rates that should have been established for mobile-to-mobile termination were much lower than those that were considered to have been in force between the operators in 2000 and as stipulated in the agreement for 2001 concluded between TMN and VODAFONE, for the company, ANACOM considered that it should ensure a progressive adjustment of rates – which demonstrates that the values it set for 2002 were even higher than those that effectively corresponded to adequate remuneration for the service and, in any event, that the closest value to that rate due would always be the one established for the second half of that year – € 0.1870 per minute, with charging per second from the first second.

Additionally, according to NOS, if one takes into account that on-net calls use all the elements of the network of a single operator, whereas interconnection uses only part of those elements, and if one also takes into account that the interconnection service is sold *"wholesale"*, while on-net calls are sold *"retail"* (with associated direct and indirect costs that are unparalleled in the former, such as customer acquisition and usage of technical and billing platforms), it must be concluded that interconnection pricing, when guided by the cost of the service that underlies it, should not be higher than the average price of on-net calls.

[10] For mobile-to-mobile termination.

It happens that, throughout 2001, in many of their tariffs, the average price of on-net calls charged by any of the mobile network operators was substantially less than 55.00 PTE, and was even, in many of their tariffs, around 30.00 PTE – which it believes demonstrates that it is totally unjustifiable for a price of 55.00 PTE per minute to reasonably be charged for interconnection services.

*(iii) Price to be set for interconnection services between OPTIMUS and TMN for 2001*

In NOS' opinion, the price to be fixed for interconnection services between OPTIMUS and TMN for 2001 should not exceed 25.82 PTE (€ 0.1287) per minute + VAT.

For the company, as far as the pricing for 2001 is concerned, the history of prices established among the mobile operators should be considered highly relevant.

Since there was no event in 2001 that determined a fundamental change in the conditions for providing the interconnection service, there is no reason why the price of that service should not be consistent with that charged in previous years. Therefore, the company considers that it is fully justified that the price to be set for 2001 should be equal to the average price that prevailed between OPTIMUS and TMN in 2000, which was 25.82 PTE per minute + VAT.

NOS points out that, in the calculation of this average price, it also considers the value of 55.00 PTE per minute that was in force in the last quarter of 2000, which, due to straightforward accounts, given its special reason for being, perhaps should not even enter the equation. If this portion were not considered, and only the rate in force in 2000 were taken into account – which was only related to the effective remuneration of the termination service – the average rate for 2000 would, after all, be only 16.09 PTE – i.e. well below the 25.82 PTE that NOS advocates should be established for 2001.

In view of the above, NOS understands that MEO's request for intervention by ANACOM to resolve the dispute over the interconnection price between OPTIMUS and TMN for the year 2001 must be rejected as ill-timed, in view of the provisions of Article 10 (2) of the Electronic Communications Law (and Article 18 (2) of Decree-Law 415/98, of 31 December). It further argues that, if this is not the case, MEO's claim that the price should be set at 55.00 PTE (€ 0.2743) per minute + VAT should be rejected, and the value to be established should not exceed 25.82 PTE per minute + VAT.

## 3. Background: Setting of the termination rate on TMN and OPTIMUS mobile networks in 2001

### 3.1 Obligations to which mobile operators were subject in 2001

Under Decree-Law 415/98, of 31 December (DL 415/98) – statute that established the interconnection arrangements between public telecommunications networks in an environment of open and competitive markets, in order to allow the interoperability of publicly available telecommunications services, and which defined the general principles applicable to numbering – it was then up to ICP-ANACOM (now ANACOM) to determine and declare undertakings with significant market power (SMP) in the markets for (i) interconnection, (ii) fixed telephone networks and or fixed telephone services, (iii) leased lines and (iv) mobile telephone networks.

Against this background, by **determination dated 03.08.2000**[11], on the assessment of SMP for the purposes provided for in DL 415/98, ANACOM decided as follows:

> *"1. To declare Portugal Telecom, SA, or the undertaking that legally succeeds it as a concessionaire, as having significant market power in the national interconnection market, in the fixed telephone networks and/or fixed telephone services market and in the leased lines market.*
>
> *2. To declare TMN – Telecomunicações Móveis Nacionais, SA, and Telecel – Comunicações Pessoais, SA, as having significant market power in the market for mobile telephone networks and/or mobile telephone services".*

In accordance with DL 415/98, undertakings designated as having SMP were subject to a set of obligations, namely, in the case of entities offering mobile telephone networks and/or mobile telephone services, in particular TMN and TELECEL (now, VODAFONE PORTUGAL – Comunicações Pessoais, SA), to respect the principle of non-discrimination in the provision of interconnection (Article 8 (1) (a) and (2)):

> *"1 - The obligations of the undertakings referred to in Article 6 (1) [undertakings with SMP] are:*
>
> *a) To respect the principle of non-discrimination in the provision of interconnection; (…)*

[11] Available at https://www.anacom.pt/render.jsp?contentId=13621.

*2 - For the purposes of subdivision a) of the preceding paragraph, the undertakings referred to in Article 6 must, in particular, offer the conditions and information that they apply to their own services, subsidiaries or associated undertakings to applicants for interconnection that offer similar services and operate under similar conditions."*

## 3.2 Mobile termination rates between mobile operators as a result of their negotiations between 1999 and 2001

*a) Rates charged between OPTIMUS and TMN*

According to the information sent by OPTIMUS in 2001 (reiterated, in part, in recent correspondence from NOS dated 28.03.2019), the following termination rates (per minute) were charged between OPTIMUS and TMN, in **1999 and 2000**:

a. During **1999**, OPTIMUS and TMN held negotiations under the terms of DL 415/98 with a view to establishing an interconnection agreement between the networks pertaining to the two companies. These negotiations ended with the definition of the commercial conditions that governed the relationship of the parties during that same year, namely that the price corresponding to the interconnection traffic terminated on the TMN network, for that year, was to be 30.00 PTE per minute (according to a letter from OPTIMUS, dated 06.11.2001).

b. Later, OPTIMUS, having realised that the remuneration conditions in place between TMN and a third operator [VODAFONE] were different, and invoking the fact that, as an undertaking holding SMP, TMN is bound by the principle of non-discrimination in its provision of interconnection, OPTIMUS maintained that it should be offered conditions identical to those offered to that third operator (according to the same correspondence, dated 06.11.2001, which, in turn, has previous correspondence attached, dated 14.09.2000, from OPTIMUS to TMN).

c. Against this background, the companies agreed the following prices for **2000**:

- from January to March 2000: 5.00 PTE;
- from April to September 2000: 22.00 PTE;
- from October to December 2000: 55.00 PTE.

In the NOS correspondence dated 28.03.2019, termination rates (per minute) between OPTIMUS and TMN are mentioned, which differ from the rates reported in 2001. In this most recent correspondence, the company specifically mentioned that, between June 1999 and March 2000, a termination rate of 4.27 PTE was charged between OPTIMUS and TMN.

Regardless of the reasons for setting the rate at 55.00 PTE, NOS, in its correspondence dated 21.03.2019, confirms that, in 2000, OPTIMUS voluntarily accepted this rate.

In relation to **2001**, under the request to intervene submitted to ANACOM by OPTIMUS on 06.11.2001 (see point 3.3. below), in short, the following information was obtained:

a. OPTIMUS, in its letter dated 06.11.2001, states that *"for the year 2001, it has not yet proved possible to reach an agreement on the rate for interconnection services. Despite this, TMN decided to bill these services at 55.00 PTE per minute; and, since Optimus had obviously refused to pay these invoices, TMN assigned its "credits" to PT Comunicações, SA, with the clear intention of allowing that company, as a member of the same group, to offset them against the debts incurred by the same Optimus",* adding that *"Optimus also communicated to TMN that, if the conditions in force in 2000 continued to apply throughout 2001, until a new agreement was finally established, the rate to be charged would certainly not be 55.00 PTE per minute, but 25.80 PTE per minute, as that was the average rate charged during the year 2000* (…)"*.*

b. Together with the aforementioned letter dated 06.11.2001, OPTIMUS sent various letters exchanged with TMN, and in a letter written by the latter to OPTIMUS dated 27.08.2001, TMN stated the following: *"Indeed, reminding you of the interconnection rates agreed between both companies to take effect as of the last quarter of the year 2000, we are sending a copy of your letter dated 14 September 2000, through which you proposed a rate of 55.00 PTE/minute, as well as a copy of our reply, dated 17 October of the same year* (…)"*.*

c. In turn, TMN, in a letter addressed to ANACOM dated 16.11.2001, attached correspondence exchanged with OPTIMUS, referring, in a letter to OPTIMUS, with the same date, that *"also taking into account that TMN maintains its understanding that an agreement has been reached with Optimus regarding the rate of 55.00 PTE/min, we kindly request that, within five days of the date of receipt of this letter, you inform us*

*whether or not you wish TMN to continue to provide interconnection services at the rate of Esc. 55.00 PTE/min".*

d. TMN, in a letter to ANACOM dated 27.11.2001, states: *"We must alert you to the fact that, although Optimus wants the ICP to set a rate to be applied from 1 January 2001, TMN considers that any decision made by the ICP on this matter may not be retroactive, and may only take effect in relation to the rates to be charged in the future. Additionally, a legal claim is currently running its course under which TMN claims the payment of several invoices issued to Optimus, based on the agreed price"* (emphasis added by the author).

e. In a letter to ANACOM dated 18.12.2001 – in response to the notification made in relation to the request to intervene submitted by OPTIMUS – TMN, among other information it provides, explains: *"ultimately, we must alert you to the fact that the setting of a rate different from the agreed 55.00 PTE would violate TMN's obligation of non-discrimination in relation to the other operators with which it has signed Interconnection Agreements, copies of which have been sent to that Institute."*

*b) Rates charged between VODAFONE and TMN*

According to correspondence from VODAFONE dated 18.12.2001, termination rates between that operator and TMN had increased from 5.00 PTE to 55.00 PTE per minute by the end of 2000. The value of 55.00 PTE per minute was charged throughout 2001.

*c) Rates charged between OPTIMUS and VODAFONE*

With regard to the rates charged between OPTIMUS and VODAFONE, NOS, in its correspondence dated 21.03.2019, states that the rate of 55.00 PTE per minute + VAT was only charged from October to December 2000, since the rate charged between January and September 2000 was adjusted to 22.00 PTE per minute, plus VAT.

In accordance with the information contained in the judgment issued under Proceeding no. 524/10.1TVLSB, OPTIMUS and VODAFONE charged reciprocal mobile termination rates of around 55.00 PTE per minute, plus VAT, in 2001[12].

**In short**, the termination rate of 55.00 PTE was set between all mobile operators, on a voluntary basis, for the last quarter of 2000, and remained in force in 2001 between TMN and VODAFONE and between OPTIMUS and VODAFONE.

It should be noted, however, that NOS understands that the amount that was in force between OPTIMUS and VODAFONE in 2001 would not be finalised, as there was no *settlement of accounts* between the parties, claiming that this amount would depend on the establishment of the amount to be charged between TMN and OPTIMUS.

### 3.3 Request for ANACOM to intervene submitted by OPTIMUS in 2001

As mentioned in the preceding paragraph, on 06.11.2001, OPTIMUS asked ANACOM to intervene in the negotiation of interconnection agreements with TMN, under the terms of Article 16 (1) (b) and (2) (c) of DL 415/98, regarding termination rates on TMN's mobile network for calls originating on OPTIMUS' mobile network, to be charged from 01.01.2001.

OPTIMUS contested the existence of any interconnection agreement for the year 2001 in relation to the amount of 55.00 PTE/minute for traffic terminated at TMN, a value which it argued had been agreed would be charged only from October to December 2000.

On 04.12.2001[13] ANACOM approved the draft decision on the rates for interconnection services charged by operators of terrestrial mobile services, following a request to intervene submitted by ONI, on 13.11.2001, to establish the prices for 2001 and 2002.

This draft decision also addressed the request to intervene submitted by OPTIMUS, with TMN, pursuant to Article 55 (1) of the Administrative Proceeding Code (in the version then in force), being asked to comment on the request to intervene submitted by OPTIMUS on 06.11.2001.

TMN, in correspondence dated 18.12.2001, informed this Authority that it did not oppose ANACOM pronouncing an opinion on the matter contained in the letter from OPTIMUS, but

[12] Document no. 10, attached to the MEO application.
[13] Available at https://www.anacom.pt/render.jsp?contentId=417379.

stated that, for the collection of the amounts that it considered to be owed by OPTIMUS, it had filed an appropriate legal claim which, at the time, was running its course at the Judicial Court of the County of Maia, under which it presented what it considered to be proof that the agreed price had been 55.00 PTE/minute, as a result of which it did not consider it necessary for ANACOM to intervene in *"negotiations that have already been concluded"* (emphasis added by the author).

Thus, TMN having confirmed that a legal claim was in progress to settle the dispute and ANACOM having considered that this claim (pending before a court of law) could involve, among other issues, the possible existence of an agreement, in its determination dated 24.01.2002[14] on the rates charged for interconnection services by mobile operators, decided *"not to intervene in the resolution of the dispute between TMN and Optimus, in view of the pending legal claim concerning the matter."*

OPTIMUS (and TMN) did not react against this decision, either through non-contentious channels or litigation.

### 3.4 Mobile termination ratees (fixed-to-mobile and mobile-to-mobile) imposed by ex-ante regulation, between 2000 and 2002

As part of the change in the system of ownership of fixed-to-mobile traffic, ANACOM intervened in the setting of fixed-to-mobile termination rates having, on 03.08.2000[15], determined that the **maximum average prices for fixed-to-mobile termination to take effect from 01.10.2000** would be 47.50 PTE (€ 0.2369), per minute, for a call duration of 100 seconds, with charging per second, at most, from the first minute.

The price in question was then set, taking into account *"the objectives pursued by ICP in determining termination rates on the mobile network and the analysis carried out in relation to current practices in some Member States, studies carried out on this matter at European level and the rate for intra-network mobile-to-mobile calls".*

On 24.01.2002, ANACOM approved the decision on the **prices of interconnection services charged by mobile operators**, following the aforementioned request for intervention

[14] Available at https://www.anacom.pt/render.jsp?contentId=420230.
[15] Available at https://www.anacom.pt/render.jsp?contentId=417972.

submitted by ONI on 13.11.2001, pursuant to DL 415/98, aiming at definition of the rates for interconnection services to be charged by the mobile operators, as it did not reach an agreement with the providers of the land mobile service regarding the prices of said services **to be charged in 2001 and 2002**.

In the weighting that was made at the time (contained in the decision in question), ANACOM took into account the values of mobile-to-mobile termination that had been in force in 2001 and the possible differentiation from fixed-to-mobile termination – under the terms set out below:

> *"(m) Whereas, in 2000, land mobile service operators freely agreed that, with effect from the date on which they changed ownership of the fixed-to-mobile traffic, the rate for call termination on the mobile network for calls originating from mobile terminals was 55.00 PTE per minute, with charging per second from the first second, and in the agreement signed for 2001 between TMN and Vodafone, the price of 55.00 PTE per minute was also established for termination, on the mobile network, of calls originating from mobile terminals;*
>
> *(n) Whereas there is also no technical evidence to support the existence of differentiated rates for the termination of traffic on mobile networks (fixed-to-mobile or mobile-to-mobile);".*

The decision on termination rates was therefore as follows:

> *"1. In 2001, the rates for interconnection services of terrestrial mobile service operators that have been charged to date, and included in the interconnection agreements already concluded and duly communicated to ANACOM, and that were in force at the end of 2000, should be applied to Oni.*
>
> *2. During the year of 2002, the maximum average national termination rates of the mobile network for calls originating from fixed terminals, per minute, for a call lasting 100 seconds, with charging per second, at most, from the first minute, must evolve as follows:*
>
> *(b) € 0.2170 (43.50 PTE), with effect from 31.03.2002;*
>
> *(a) € 0.2070 (41.50 PTE), with effect from 30.06.2002;*
>
> *(a) € 0.1970 (39.50 PTE), with effect from 30.09.2002;*
>
> *(a) € 0.1870 (37.50 PTE), with effect from 31.12.2002;*
>
> *3. Terrestrial mobile service operators must complete the negotiation of interconnection agreements to be concluded with each other, to take effect in 2002, within 20 days."*

The decision in question invokes the obligations to which entities with SMP are subject, under the terms of Article 8 (1) (a) of DL 415/98, namely subjection to the principle of non-discrimination in the provision of interconnection. However, it is recalled that it was also in this determination that ANACOM decided *"Not to intervene in the resolution of the dispute between TMN and Optimus, in view of the pending legal claim concerning the matter"*, as referred to in point 3.3 above.

On 29.05.2002, ANACOM approved the decision on **intervention in national termination rates on the mobile network for calls originating from mobile terminals to be charged in 2002**[16]. This decision arises because, although the aforementioned decision of 24.01.2002 determined the conclusion of the negotiation of interconnection agreements within 20 days, TMN, OPTIMUS and VODAFONE failed to reach an agreement (although VODAFONE and OPTIMUS agreed on a value to be charged in 2002), as a result of which they asked ANACOM to intervene to fix the mobile-to-mobile termination rate to be charged from 01.01.2002.

Under this new decision, this Authority, invoking among other factors (i) the history of negotiations and interventions by ANACOM, namely the background already included in the determination of 24.01.2002, (ii) the agreement that had in the meantime been negotiated between VODAFONE and OPTIMUS for 2002 (mobile termination rate of € 0.1870 per minute) and the agreement signed between TMN and OniWay – Infocomunicações, SA, also for 2002 (with mobile termination rates that varied, throughout the course of the year, between € 0.2369 per minute and € 0.1870 per minute), (iii) the need for a progressive adjustment of mobile-to-mobile termination rates compared to the price in force in 2000 and established in the agreement signed for 2001, between TMN and VODAFONE, and (iv) the objectives of promoting competition with which ANACOM's actions must comply, determined the following:

> *"1. Under Article 16 (1) (b) and (c) and (2) (a) and (c) of Decree-Law 415/98, of 31/12, which:*
>
> *1.1. During the year 2002, the maximum (average) national termination rates on mobile network for calls originating from mobile terminals, to be included in the interconnection agreements to be concluded between the TMSO, should evolve as follows:*
>
> *(a) € 0.2070 per minute, for a call duration of 100 seconds, with charging per second, at most, from the first minute, with effect from 01.01.2002;*

[16] Available at: https://www.anacom.pt/render.jsp?contentId=419439.

*(a) € 0.1870 per minute, with charging per second from the first second, with effect from 30.06.2002;*

*1.2. Optimus, TMN and Vodafone must complete the negotiation of interconnection agreements to be concluded with each other within 10 days, taking into account, specifically, the maximum values set out above and that:*

*(a) The rate for the termination service is established by the operator that terminates the traffic;*

*(b) Undertakings being designated as having significant market power are subject to the principle of non-discrimination in the provision of interconnection."*

The following **table** summarises the **termination rates agreed between operators** and the **maximum termination rates set by ANACOM** for the **period 2000-2002**.

| Year/Quarter | **Termination rates agreed between operators** | | | **Maximum termination rates set by ANACOM** (2) | |
|---|---|---|---|---|---|
| | **TMN-Optimus Optimus-TMN** | **Vodafone-Optimus Optimus-Vodafone** | **TMN-Vodafone Vodafone-TMN** | **Fixed-to-Mobile Termination** (3) | **Mobile-to-Mobile Termination** (4) |
| Q1 2000 (1) | 0.0213 | 0.1097 | 0.0249 | | |
| Q2 2000 | 0.1097 | 0.1097 | 0.1097 | | |
| Q3 2000 | 0.1097 | 0.1097 | 0.1097 | | |
| Q4 2000 | 0.2743 | 0.2743 | 0.2743 | 0.2369 | |
| Q1 2001 | | 0.2743 | 0.2743 | ONI-mobile operators: Maximum rates for mobile operators charged at the end of 2000 | |
| Q2 2001 | | 0.2743 | 0.2743 | | |
| Q3 2001 | | 0.2743 | 0.2743 | | |
| Q4 2001 | | 0.2743 | 0.2743 | | |
| Q1 2002 | | 0.1870 | | | 0.2070 |
| Q2 2002 | | 0.1870 | | 0.2170 | 0.2070 |
| Q3 2002 | | 0.1870 | | 0.2070 | 0.1870 |
| Q4 2002 | | 0.1870 | | 0.1970 | 0.1870 |
| Q1 2003 | | | | 0.1870 | |

(1) The value of TMN-Optimus/Optimus-TMN termination included in the table corresponds to that conveyed on 28.03.2019 (4.27 PTE) and not the amount that resulted from correspondence sent in 2001, which was around 5.00 PTE.

(2) ANACOM has set maximum prices per minute, for a call lasting 100 seconds, with charging per second, at most, from the first minute, with the exception of the maximum value fixed for mobile-to-mobile termination, with effect from 01.06.2002, in which the price was set per minute with billing per second from the first second.

(3) The maximum value of fixed-to-mobile termination to be charged with effect from 01.10.2000 was set by means of ANACOM decision dated 03.08.2000; the maximum values for fixed-to-mobile termination set for ONI-mobile operator termination to be charged in 2001 were set by means of ANACOM decision dated 24.01.2002; under the same decision, the maximum values for fixed-to-mobile termination (among all operators) were set to be charged with effect from 31.03.2002, 30.06.2002, 30.09.2002 and 31.12.2002.

(4) The maximum values for mobile-to-mobile termination were set on 24.05.2002 to be charged with effect from 01.01.2002 and 01.06.2002.

Note: Prices expressed in euros. Prices originally set in escudos (PTE) were converted into euros at a rate of 200.482.

## 4. Judicial litigation between TMN and OPTIMUS

In its request, received by ANACOM on 31.07.2018, MEO states that both TMN and PT Comunicações, SA (PTC), and MEO itself (which resulted from the previous two), have always opposed the idea that only ANACOM would have competence to determine the price due for mobile-to-mobile call termination services, in 2001, between TMN and OPTIMUS, having pleaded before the judicial courts that, a request to that effect having been expressly filed by one of the parties, the courts could not avoid analysing it and deciding on the rate to be charged in that context.

Two claims were filed[17], which are summarised below.

### 4.1 Claim filed by TMN vs OPTIMUS

On 10.10.2001, TMN filed an action seeking a declaration against OPTIMUS before the Judicial Court of the County of Maia, in which it requested that the company be ordered to pay 70,540,108.00 PTE (€ 351,852.58), plus interest on arrears (falling due). This proceeding ran its course under the no. 723/2001.

As is clear from the text of the initial part of the judgment[18] handed down by the aforementioned Court (on 24.09.2007), that amount corresponded, in the company's opinion, to the balance in its favour resulting from the price per minute of the interconnection service provided during the year of 2001 (which would result from the *"settlement of accounts"* mentioned in the original application), a price that would amount to 55.00 PTE + VAT and which would remain in effect until a new agreement was signed.

Indeed, TMN argued that the aforementioned price had been agreed with OPTIMUS for the year 2001 (having also been the price agreed and charged in the last quarter of the year 2000) and that, despite not being included in a signed contract, the agreement resulted from correspondence exchanged between the parties and the current regulatory framework – with a set of invoices for interconnection services provided being attached to the case file.

[17] Proceeding no. 723/2001 – TMN vs OPTIMUS – and Proceeding no. 524/10.1TVLSB – NOS vs PTC.
[18] Document no. 5, attached to the MEO application.

Additionally, TMN claimed that it had transferred a significant part of its claims against OPTIMUS, related to the termination service provided in 2001, to the then PTC. The amount requested in the case in question therefore corresponded to the remaining claims not transferred to PTC.

OPTIMUS contested the alleged facts and concluded that the price should be set, provisionally, at 25.82 PTE.

Additionally, OPTIMUS submitted a counterclaim under this action, requesting that the court declare *"with effects binding on both TMN and PT-Comunicações, that neither through letters exchanged between it and TMN on 14 September 2000 and 17 October 2000, nor through any other, was an agreement concluded regarding the price (final and not merely provisional) applicable to interconnection services (voice traffic) with effect from 1 January 2001"*[19].

It should also be noted that, under this proceeding, OPTIMUS petitioned the main intervention of PTC. The intervention was allowed and OPTIMUS, PTC and TMN joined as parties.

The judgment handed down reads[20]:

> *"*(…) *It seems to us that it should be taken into account that OPTIMUS asked ANACOM to intervene under the terms of Decree-Law 415/98, in order to set the mobile-to-mobile termination rate to be charged from 01/01/2001* (…).
>
> *And that ANACOM decided not to intervene in the resolution of the dispute between TMN and OPTIMUS, as this legal claim was running its course, which concerned, "among other issues, the possible existence of an agreement"* (...).
>
> (…) *the Defendant* [NOS] *states in the rejoinder, when justifying the submission of the counterclaim, "It is not, therefore, accurate that the determination means that the ICP* [ANACOM] *will never set a price other than Esc. 55.00 PTE" per minute – but only that this will not happen until it is demonstrated by a court ruling that the interested parties did not reach an agreement on the rate, since it is the very assumption for the intervention of the ICP* [ANACOM] *and which one of the parties contests. Once the counterclaim submitted by OPTIMUS has been upheld, it will be able to prove to the ICP* [ANACOM] *that no real agreement existed and that the ICP* [ANACOM] *must therefore intervene."*
>
> (…)

[19] See the page of the judgment that corresponds to page 3,602 of the case file concerned.
[20] Emphasis added by the author.

*Within the specific context into which the activity of the parties to the dispute falls, we believe that ANACOM will be the entity that will best ensure the objectives of promoting competition, taking into account regulatory practice.*

(…)

*Thus, we believe that we should not apply in this particular case the regulation of the Civil Code regarding pricing in contracts for services.*

*And refer to ANACOM, after the promised request of the Defendant herein in this regard, the setting of interconnection rates in the voice service to be charged between the parties for the year 2001."*[21]

Against this background, the action brought by TMN was considered totally inadmissible, as unproven, and as a result, OPTIMUS was acquitted of the claim against it.

In turn, the counterclaim that had been filed by OPTIMUS was deemed fully upheld, and, as a consequence, the Court declared, with effects binding on both TMN and PTC, that neither through letters exchanged between the parties on 14.09.2000 and on 17.10.2000, *"nor through any other"*, was an agreement concluded between the parties regarding the rate applicable to interconnection services (voice traffic) with effect from 1 January 2001.

This judgment was later confirmed both by the Porto Court of Appeal and by the Supreme Court of Justice (STJ), in their judgments of the appeals that were successively filed by TMN and PTC.

MEO did not attach the Judgment of the Porto Court of Appeal to the application containing the request to intervene filed in 2018. However, this is cited in STJ Judgment dated 20.01.2010.

In the aforementioned Judgment[22], the STJ, referring to the appeal lodged with the Court of Second Instance, explained: *"By Judgment of the Porto Court of Appeal* (…) *the appeal lodged against the decision on the matter of fact was partially upheld* (…) *but, for the most part, the judgment was confirmed, by adhering to the respective grounds (…)."*

In short, the STJ reports that the Appellants TMN and PTC questioned the fulfilment, by the Court of Appeal, of the duty to review the facts resulting from the *principle of a second tier of*

[21] See the pages of the judgment now under analysis that correspond to pages 3621 and 3622 of the case file.
[22] Document no. 6, attached to the MEO application. At the STJ, the appeal was assigned the Case number 195/09-7.

*judicial authority in matters of fact*, as provided for in the Code of Civil Procedure, also pointing out factors that invalidate that Judgment, due to a failure to adjudicate and a failure to state reasons.

Regarding these aspects, the STJ stated that *"The purpose of the legal consecration of a second tier of judicial authority in matters of fact, as expressly results from the preamble of Decree-Law 39/95,* (…) *is not to create a new trial at the Appeal Court, but to allow the correction of errors of judgment, naturally through a proper assessment of the evidence",* concluding that the applicable rules were not violated, *"since the manner in which the Appeal Court judged the appeal of the matter of fact did not undermine the fundamental right of access to the law and the courts, or effective judicial protection; before it executed it."* And the Court added that there was also no foundation in the motion for the invalidity of the Judgment under appeal, based on an alleged failure to adjudicate and a failure to state reasons, since there was not "(…) *any violation of the constitutional rule that judicial decisions need to be substantiated* (…) *or of the provisions"* of the CCP[23].

As for the decision of law, the Appellants appealed to the presumption of Article 799 (1) of the Civil Code, with the STJ concluding that:

> "(…) *the price to be charged in the year 2001 for the interconnection service regarding voice traffic not having been proven, the first instance had no alternative but to allocate the consequence of the lack of proof of an element constituting the right asserted by the claimant – the right to payment of the price – to the encumbered party, i.e. to the claimant, pursuant to Article 342 (1) of the Civil Code; and it had no alternative because it expressly considered the application of the criteria defined by civil law for pricing in contracts for services to be inappropriate* (…)*, rather, ANACOM being responsible for intervening in the litigation with this objective"*[24].

And the same Supreme Court adds:

> *"Recourse to the rules of the burden of proof was therefore not intended to achieve the parties' real wishes* (...)*; rather it became necessary to overcome the lack of proof regarding the value of the services that the claimant intended to charge in this action for the year 2001.*

[23] See pages 27 and 28 of the STJ Judgment under analysis.
[24] See page 30 of the STJ Judgment dated 20.01.2010 (emphasis added by the author).

*Furthermore, as noted in the judgment, neither has the volume of traffic found between the claimant and the respondent been proven* (…). *Therefore, it was not ascertained whether or not the balance that the claimant claims in its favour actually existed* (…)"[25].

Regarding the question of the existence (or not) of an agreement between TMN and Optimus, the STJ also states, in particular, the following:

*"The appellants also disagree with the interpretation reached by the authorities regarding the agreement resulting from the proposal of 14 September 2001* [SIC] *and the acceptance of the following October.*

(…)

*It is then necessary to verify whether the meaning that the authorities attributed to the declarations of the parties, embodied in the letters of 14 September and 17 October 2000, corresponds to that which "a normal recipient of a declaration, placed in the position of the real recipient of a declaration" would attribute to them, in the part relevant to determining whether or not the price of 55.00 PTE per minute (plus VAT) was also effective "indefinitely with effect from 1 October 2000, as the claimant maintains, or only between that date and the end of 2000, as claimed by the defendant.*

(…)

*However, it cannot be taken from the letter of the business declaration that the price of 55.00 PTE is proposed by Optimus to be effective indefinitely with effect from 1 October 2000.*

(…)

*Herein,* (…) *it must be concluded that the meaning that is objectively extracted from the proposal dated 14 September is that the prices referred to therein are only valid for the corresponding periods of the year 2000.*

(…)

*And any linguistic lapse that may have occurred in the formulation "with effect from the last quarter" is irrelevant, as, in the context of the declaration, the meaning is clear.*

(…)

*In the absence of proof that the parties' real intention was to agree on a price to be charged with effect from 1 October 2000, for an unlimited time, it must be concluded that*

[25] *Idem ibidem*.

> *no agreement on the price to be charged as from the end of 2000 resulted from the proposal dated 14 September 2000 and the acceptance of 17 October following"*[26].

As for the assignment of credits also claimed by the Appellants TMN and PTC, the STJ considered that *"The dismissal of the request made in this action and the validity of the counterclaim,* (...) *preclude* (...) *the acceptance of this claim".*

*Ultimately*, the STJ dismissed the appeal for review that had been filed.

### 4.2 Claim brought by OPTIMUS vs PTC

After the first legal claim – marked by the STJ Judgment becoming final – on 08.03.2010, the (then) Sonaecom (now NOS) brought an action against PTC, demanding: (i) the declaration of ineffectiveness of various statements of offsetting, made by PTC, of credit balances that Optimus held against said company, with (alleged) credits against Optimus, which had been assigned to it in the meantime by TMN; (ii) PTC be ordered to pay the amount of € 25,355,040.21, plus interest; and (iii) PTC be ordered to pay the costs of the lawsuit, attorney's office and other charges.

The aforementioned Proceeding ran its course at the Judicial Court of the County of Lisbon, under the number 524/10.1TVLSB, having been decided (by the aforementioned Court) by judgment dated 15.07.2015.

Under this proceeding, as in the first, ANACOM was not called upon to act by either party (or by the Court) and, therefore, was not the addressee of the judgment in question.

In its judgment, the Court stated, in particular, the following[27]:

> *"**The decision handed down under the Proc. that ran its course in Maia under the no. 703/2001 thus constitutes a res judicata as to what was decided therein and binds the Claimant and the Defendant**, and the reason for the intervention of the Defendant in that action consisted precisely of that which was subsequently claimed against it, the inexistence of a pricing agreement applicable to interconnection services with effect from January 2001, taking into account the assignment of TMN's credits to the Defendant herein* [PTC].

[26] See pages 30 to 36 of the STJ Judgment (emphasis added by the author).
[27] Our emphasis.

> *It constitutes a res judicata not only with regard to the decision-making part of the judgment, but also "to the decision of those preliminary issues that are a logical precedent for the issuance of the dispositive part of the judgment", namely with regard to the pricing of the services provided by recourse to rules of the CC, especially those contained in Article 1158, as it is understood that, in the absence of an agreement, it was incumbent upon ANACOM to set interconnection prices in the voice service to be charged between the parties in 2001."*

This second claim was upheld, as it was proved that (i) the said *"credit offsets were declared inoperative"*, and (ii) the Defendant (PTC) was further ordered to pay the Claimant (then Sonaecom, now NOS), the amounts requested, as well as the costs of the proceedings.

For this purpose, and among other grounds presented in the decision in question, the Court considered that, *"As already decided in the action that ran its course in Maia, the absence of an agreement on the price of the services provided and a definition of the services themselves (i.e. the existence of these credits in favour of TMN), which led to the dismissal of the demand for payment of the invoices issued by TMN relating to interconnection services provided to the Claimant herein, in the year 2001, precluded and precludes recognition of the validity of the aforementioned assignments of credits made by TMN to the Defendant, and consequent offsetting of them with counter-credits pertaining to the Defendant [PTC] against the Claimant".*

MEO filed an appeal against that decision, but the Lisbon Court of Appeal (TRL) ended up dismissing it as unfounded, maintaining the judgment of the Court of First Instance.

The following excerpts from the Judgment of the TRL are of particular note[28]:

> "(…) ***the absence of agreement on the pricing of the services in question*** *and the services provided led to the dismissal of the demand for payment of the invoices issued by TMN in 2001, which obviously also precluded and precludes the assignments of credits for subsequent offsetting from being considered valid.*
>
> *However,* ***the case heard at the Court of Maia produced res judicata effects both in terms of pricing between TMN and OPTIMUS,*** *as well as* ***in terms of the competence of Anacom to set interconnection rates.***
>
> *The effects of the res judicata occur before the parties that intervene in the proceedings, as well as, in relation to those that assumed the legal position of those who were parties to the proceedings, in the words of Antunes Varela, Manual do Processo Civil page 722.*

[28] Our emphasis.

*Thus, as TMN was bound by what was decided under those proceedings, the defendant herein, as concessionary of those credits, was also covered by it.*

*That is not to say, as the appellant claims, that it was now up to the court to set the price under the terms of Article 1158 (2) of the Civil Code, which suggests that the measure of remuneration, in the absence of an adjustment between the parties, is determined by professional fees, in the absence of these, by practices and, in the absence of both, by judgments of fairness,* ***as this criterion was removed under the scope of Proceeding no. 723/2001****.* (…)".

After the delivery of the Judgment of Lisbon Court of Appeal dated 20.09.2016, MEO also filed an appeal for an exceptional review to the Supreme Court of Justice, which, on 09.03.2017, did not allow it, based on a failure to fulfil the legal requirements established for the purpose.

Subsequently, MEO lodged an appeal to the Constitutional Court (TC) against 3 decisions (one issued by the TRL and two issued by the STJ) – that Court, by means of a Summary Judgment, deciding not to hear the substance of the appeals.

Unwilling to accept that decision, MEO complained to the Closed Session (of the TC), but said complaint was likewise dismissed, by decision of 05.04.2018.

## 5. Analysis

As a preliminary point, it is important to point out that, from the analysed jurisprudence contained in the documentation submitted by MEO, two essential aspects stand out that should be kept in mind: ***(i)*** ANACOM is not the addressee of the decisions handed down in any of the aforementioned legal proceedings (since it was never a party to the aforementioned proceedings) and, as such, is not bound by them; and ***(ii)*** the filing of the second proceeding (that is, Proceeding no. 524/10.1TVLSB, brought by the then SONAECOM vs PTC in relation to the offsetting of credits) did not constitute an impediment to the submission of a request for administrative resolution of the dispute relating to the rate for mobile-to-mobile call termination services reciprocally provided in 2001.

*(i) <u>The decisions handed down in any of the legal proceedings are not binding on ANACOM</u>*

Regarding the first point, it is important to note that, since ANACOM is not a party to the aforementioned legal proceedings, the considerations made in the above jurisprudence (the decisions handed down by the courts that heard them) **did not impose (nor do they impose) upon ANACOM any duty to make decisions** on the matters concerned.

And they do not – nor could they ever – from the outset because, as stated in the Lisbon Court of Appeal Judgment mentioned above, the *effects of the res judicata occur before the parties that intervene in the proceedings, as well as in relation to those who took the legal position of those who were parties to the proceedings* – being recognised, in terms of legal theory and jurisprudence, that decisions **only bind the parties to the proceedings, or those who come to assume the position of party** (hypothetically, by being called to the proceedings, as main parties).

It should be noted that, although the instance could have changed, in accordance with the law, this did not happen, the parties involved in each action remaining unchanged since the first instance (without ANACOM being called upon to intervene in any proceedings).

As such, the decisions made – with particular emphasis, due to their importance, on those concerning the first proceedings mentioned – could not be binding on this Authority[29].

From the judicial decisions handed down until 2010 (i.e. within the scope of the first judicial proceeding referred to above), it is clear that, in the analysis that was made, the Courts understood that it could not be taken for granted that an agreement existed between the (current) MEO and the (current) NOS, as to the rate to be charged, in 2001, for the interconnection service regarding voice traffic (which resulted, in particular, from the letters dated 14.09.2000 and 17.10.2000) and that, in the absence of an agreement and the application of the criteria defined by civil law for the pricing of contracts for services not being appropriate, ANACOM would be better able to establish the prices in question.

In other words, the Courts understood that the issue of pricing should be left to ANACOM, limiting itself to verifying that, in view of the law, this was the entity best positioned/qualified to do so – **not having determined that ANACOM** should proceed with that pricing.

[29] A conclusion, moreover, confirmed by the jurisprudence.
Here we refer, among others, to the Judgment of the Lisbon Court of Appeal, dated 03.04.2014, issued in the context of Proceeding no. 1149/13, which reads: *"The res judicata cannot take place against those who have not had the opportunity to intervene in the proceeding in which the sentence is handed down, as a result of which that subjection of third parties to the regime defined in the judgment is not subject to the authority of res judicata, but only to the effectiveness of the judgment, being restricted to the level of practical or de facto effects, and the existence or substance of a right of a third party cannot be affected."*; and also, for the Judgment of the Supreme Court of Justice dated 19.01.2016, under Proceeding 126/12, where it mentions: *"The fact that a judgment was handed down in an action in which absolute and subjectively binding rights are discussed, such as the right of property, does not expand its effectiveness beyond the subjects involved in the proceedings, and can neither bind, nor encompass all in relation to the exclusion of ownership of the thing, but only those among whom the judgment attributed and delimited the exclusion of the trespass of the affected right."*

*(ii) The filing of the second proceeding did not prevent the request for administrative resolution of the dispute between MEO and NOS*

Once the STJ's decision was rendered final in 2010 under the first proceeding referred to above, NOS launched a second legal claim, the object of which was the offsetting of credits that had been done by the then PTC, following an assignation of debts of TMN in its favour.

However, in view of the res judicata resulting from the decisions rendered under the first proceeding, the courts that heard the second could not decide in any other way than to consider invalid *the aforementioned assignments of debts by TMN to the Defendant* [PTC] *and consequent offsetting of them with counter-credits by the Defendant* [PTC] *against the Claimant* [now NOS], since it had been declared by the Judicial Court of the District of Maia, in the previous process, that no agreement existed concerning the prices to be charged.

And it was only this matter that constituted the subject matter of this second dispute and that, therefore, was also the subject of rulings in the second proceeding.

Although, in this second proceeding, when referring to the res judicata, the Court of First Instance mentioned that, in the previous proceeding, the Court of Maia had already stated that, in the absence of an agreement, ANACOM would be better placed *to set the interconnection rates in the voice service* to be charged in 2001, also in this case, the Court did nothing more than express its understanding of its interpretation of the law, without **having constituted an obligation for ANACOM to decide the dispute – not only because this Authority was not, ever, a party to any of the proceedings, but also because, after it had been judicially determined that there was no agreement between the parties, it would always be necessary for ANACOM to intervene for this purpose.**

It should be noted, moreover, that the Court of Maia even mentions, in its judgment dated 24.09.2007, that it understood *"it should not apply, in this particular case, the regulations of the Civil Code regarding pricing in contracts for services",* referring *"to ANACOM, after the promised request of the Defendant herein to this effect, the setting of interconnection rates in the voice service to be in force between the parties for the year 2001"* – thus recognising the need for a request to be submitted for the purpose.

And the TRL, in the Judgment handed down in the context of the second legal claim, considered that **the decision of the *Court of Maia had the effect of res judicata***, *both in*

*terms of the* ***pricing between TMN and OPTIMUS****, and in terms of* ***it falling under the remit of Anacom to set the interconnection rates****.*

Thus, it appears that, under the first proceeding, it was recognised that there was no price agreement and that, under the second it was decided that, having already judicially determined that there was no agreement on the rates to be charged, the *assignments of debts by TMN to PTC and the consequent compensation of them with "counter-credits"* of PTC against OPTIMUS could not be considered valid.

And just that.

It should be noted that, in view of the applicable sectoral legislation, the interpretation of the Courts on the competence of ANACOM to establish the maximum value of the rates to be charged for the interconnection service is hardly surprising.

At this point, it is deemed appropriate to recall that ANACOM (at the time, ICP-ANACOM), in its determination dated 24.01.2002 on the rates for interconnection services charged by mobile operators, decided *"not to intervene in the resolution of the dispute between TMN and Optimus,* [only] *in view of the pending legal claim concerning the matter"*, which was, it should be remembered, the existence (or not) of a price agreement between the operators in question – which was, in fact, recognised by the courts, namely by the County of Maia.

It follows that, once the question of whether or not a price agreement existed was (judicially) resolved, either it would be concluded that neither TMN, nor the then SONAECOM, could ask ANACOM to intervene, but that ANACOM could intervene, on its own initiative (which would happen if the Court recognised that that agreement existed), or it would be concluded that nothing prevented the intervention of ANACOM from being requested (by any of the interested parties), under the terms (and time frame) legally provided (and recognised by the Courts), should the Court conclude – as it did – that no agreement existed that would be binding on the companies for the year 2001 (a situation in which ANACOM would then be prohibited, in accordance with the law, to intervene on its own initiative[30]).

[30] As is clear from the Article 63 (2) (b) of the ECL.

In other words, with effect from 2010 (from the final decision handed down in the first proceeding[31]), there was nothing to prevent TMN or SONAECOM asking ANACOM, pursuant to Article 63 (2) (b), by reference to Article 10, both of the ECL[32], to resolve the dispute, precisely based on the decision of the first proceeding (which concluded, with res judicata effects, that no agreement existed on the rates).

But that was not the case.

It should be reaffirmed that the second proceeding had as its object only the offsetting of credits that PTC had requested from (now) NOS, and the issue of the existence of an agreement on the termination rate is no longer under discussion (a question that the TRL itself considered to have been resolved – with res judicata authority – under the first legal claim).

Therefore, if any of the companies had requested (in due time) the intervention of ANACOM and any of the interested parties did not comply with the decision of the procedure for the administrative resolution of the dispute adopted by this Authority, it could always challenge it (non-contentiously or judicially – in the latter case, before the courts of the administrative jurisdiction) – subsequently raising, hypothetically, within the scope of the proceeding brought by SONAECOM (as mentioned above), the existence of a preliminary question or asking for the suspension of the respective proceedings.

As such, also for this reason it may be inferred that, after 2010, there was no pending judicial connection that would preclude a request for ANACOM to resolve the dispute relating to the rate for mobile-to-mobile call termination services reciprocally provided in 2001.

In view of the foregoing, the conclusion cannot be avoided that the procedure that MEO requests herein could (and should, as will be seen later) have been requested as early as 2010, and not 8 years after the Judgment of the STJ became final.

[31] Or (as stated by the TRL), from the moment that the *Court of Maia proceeding* **produced res judicata effects** (both in terms of pricing between TMN and OPTIMUS, and in terms of the competence of ANACOM to set interconnection rates).

[32] Law which, in 2010, was already in force and which revoked Decree-Law 415/98, of 31 December (which established the interconnection regime between public telecommunications networks in an environment of open and competitive markets, in order to allow the interoperability of publicly available telecommunications services, and defined the general principles applicable to numbering).

In the context of administrative dispute resolution, it is first necessary to **verify whether or not the legal requirements for intervention by ANACOM** to resolve the dispute in question have been fulfilled.

According to the provisions Article 63 (2) (b) of the ECL:

*"It is up to the NRA:*

(…) *b) To intervene on its own initiative, where justified, including in agreements already concluded, or, in the absence of agreement between the companies, at the request of any of the parties involved under the terms of Articles 10 to 12, in order to guarantee the objectives established in Article 5, in accordance with the provisions of this law."* (emphasis added by the author).

In the present case, the absence of an agreement between NOS and MEO was declared in court, with res judicata effects, being, therefore, evident the *"absence of agreement between the companies"*, as a result of which the intervention of ANACOM would depend on a request from any of the parties, under the terms of Article 10 of the ECL.

The competence of ANACOM to intervene to resolve a dispute depends on the fulfilment of several requirements provided under Article 10 of the ECL, namely: (i) the existence of a dispute, (ii) related to obligations arising from the ECL, (iii) found among the companies subject to the arrangements of this Law, (iv) in national territory and (v) provided that one of the parties asks ANACOM to intervene (see paragraph 1 of the aforementioned principle).

In the present case, it is clear that the requirements (i) to (v) above have been fulfilled: (i) there is a dispute between MEO and NOS; (ii) the dispute relates to obligations arising from the ECL (Articles 62 et seq. of this Law); (iii) the two companies in conflict are subject to the ECL; (iv) the dispute occurs in the national territory; and (v) one of the parties (MEO) asked ANACOM to intervene.

However, MEO requested the intervention of ANACOM around 17 years after the dispute between TMN and OPTIMUS began, and eight years after the final decision regarding the first legal claim (in which the existence, or not, of an agreement was discussed).

In its letter dated 30.07.2018, MEO argues that *"there is no doubt regarding the fact that (…) is in time to ask ANACOM to resolve the dispute in question herein."*

For this, it states that *"only with effect from the date of the decision becoming final (the decision of the Constitutional Court that rejected the constitutionality appeal filed by the company under Proceeding 524/10.1) did it truly become possible for ANACOM resolve the dispute between the parties."* It adds that *"it was only from that point that it was confirmed, with the force of res judicata, that the competence to determine the price, in the absence of agreement between the parties, rests exclusively with ANACOM and not also with the courts, contrary to that which had been understood by this authority, in 2002* (…)*"* (emphasis added by the author).

It is important to make clear here that what ANACOM understood in 2002 was not that which MEO claims, but only that, as a legal claim was running its course discussing whether or not there was a price agreement between the companies in conflict, this Authority was not to intervene in the dispute, since that issue was being settled in court. This is clearly the result of the text of the deliberation in question and which was, moreover, recognised by the courts (it is recalled, again, that in the judgment dated 24.09.2007, the Judicial Court of the County of Maia expressly states that "*ANACOM decided not to intervene in the resolution of the dispute between TMN and OPTIMUS, as this legal claim was running its course, which concerned, "among other issues, the possible existence of an agreement*[33]*".*

Moreover, and with regard to MEO's statements, as transcribed above, it is likewise incorrect when it states that *"only with effect from the date of the decision becoming final (the decision of the Constitutional Court that rejected the constitutionality appeal filed by the company under Proceeding no. 524/10.1) did it truly become possible for ANACOM to resolve the dispute between the parties"* and that *"it was only from that point that it was confirmed, with the force of res judicata, that the competence to determine the price, in the absence of agreement between the parties, rests exclusively with ANACOM"*.

To counteract this, all that is required is to look at the content of the aforementioned court decisions, especially those that were issued in the context of the second legal claim filed: the Judicial Court of the County of Lisbon considered that *"The decision handed down under the Proc. that ran its course in Maia under the no. 703/2001, constitutes* (…) *res judicata in terms of what was decided therein* (…)", the Lisbon Court of Appeal also expressly stating that *"*(…) *the proceeding of the Court of Maia had the effect of res judicata both in terms of pricing between TMN and OPTIMUS, as well as in terms of the competence of Anacom to set interconnection rates"*.

[33] Emphasis added by the author.

In view of the above, and with MEO arguing that ANACOM *"would be legally bound to accept* [its] *request* [for intervention] *and resolve the dispute* (...)*"*, it is necessary to verify whether there are grounds for refusing to consider the request.

Under the terms of Article 10 (2) of the ECL, the intervention of ANACOM must be requested within a maximum period of one year from the date of the start of the dispute.

However, bearing in mind that:

(i) with respect to the dispute between the then TMN and OPTIMUS, around 17 years have passed since it started;
(ii) with respect to the Judgment of the STJ becoming final regarding the action filed by TMN in which the company requested that OPTIMUS be ordered to pay the balance, then favourable to TMN, of the credits originated by the termination service reciprocally provided during 2001 (i.e. the first proceeding referred to above), 8 years have passed, without any of the parties having asked ANACOM to intervene in this regard;
(iii) since the Judgment of the STJ became final, any party could have submitted a new request for the administrative resolution of disputes to ANACOM, but this did not occur;
(iv) the existence of the second legal claim filed by SONAECOM (now NOS) did not preclude the submission of that request (nor the resolution, through administrative means, of the dispute over the rate for mobile-to-mobile call termination services reciprocally provided in 2001);

it is necessary to conclude that, since ANACOM was asked to intervene by MEO only in a letter received by ANACOM on 31.07.2018, the request submitted for this purpose is ill-timed, since it was filed after the maximum period established in Article 10 (2) of the ECL had elapsed (even taking as reference, as the starting date of the dispute, in view of the specific circumstances of this case, the date on which the Judgment of the Supreme Court of Justice, dated 20.01.2010, became final).

As for the intervention of ANACOM under its legal powers as the sector's regulatory authority – also claimed by MEO – it should be noted that the legislator defined ANACOM's powers in terms of access and interconnection in Article 63 of the ECL, this Authority being bound by the principles of legality and specialty.

In this context, it should be noted that the interconnection and interoperability of services has not been called into question, a fact which, incidentally, neither party challenges (only issues relating to the values due for interconnection having been discussed in court). Therefore, it would not be justified for this Authority to intervene on its own initiative. In the absence of an agreement between the parties in terms of rates, any intervention by ANACOM is ineluctably governed by the provisions of the second part of Article 63 (2) (b) of the ECL, which in turn refers to the regime of Article 10 of the same law, it already having been concluded that the request is out of time.

## 6. Prior hearing of interested parties

Having analysed and weighed the various facts and arguments put forward by the parties to the present procedure, the ANACOM Management Board, by determination of 21 November 2019, approved the draft decision on MEO's request for intervention to resolve the dispute with NOS regarding the rate for mobile-to-mobile call termination services reciprocally provided in 2001 between TMN and OPTIMUS.

Said draft decision was submitted to a prior hearing of interested parties, pursuant to the provisions of Articles 121 and 122 of the Administrative Proceeding Code, with a period of 10 working days being established for MEO and NOS to make representations, in writing.

Following a request from MEO, received on 28 November 2019, this Authority granted an extension, for 15 working days, of the time limit for submission of representations, by decision of the Chairman of the Management Board dated 3 December 2019, ratified by determination of the Management Board dated 5 December 2019.

MEO and NOS made representations within the time allowed.

Following the prior hearing, the respective report was prepared, which includes a summary of the positions expressed on the draft decision, as well as ANACOM's understanding of them. This report forms an integral part of and, together with the above analysis, justifies this decision.

## 7. Decision

In light of the foregoing, in the performance of the tasks provided for in Article 8 (1) (a), (b), (c) and (g) of the Statutes, as approved by Decree-Law 39/2015, of 16 March, in the exercise of the powers provided for in Article 9 (2) (b) of those same Statutes, as well as the powers

provided for in Article 10, Article 11 (1) (b) and Article 63 (2) (b) of the ECL, the Management Board, acting in accordance with Article 26 (1) (q) of the Statutes, decides:

1. To refuse the request for intervention submitted by MEO, under Article 10 of the ECL, in the pricing to be applied to the termination services reciprocally provided by TMN (currently MEO) and OPTIMUS (currently NOS) in 2001, due to the fact that the maximum period established in Article 10 (2) has already been exceeded.

2. To reject an intervention *"under its legal powers as the sector's regulatory authority"*, invoked as an alternative by MEO, as the conditions for the application of the first part of Article 63 (2) (b) of the ECL have not been fulfilled.

Lisbon, 20 February 2020.