

## **FINAL DECISION**

### **CONSIDERATION OF COMMISSION RECOMMENDATION OF 29.11.2016 ON CASES PT/2016/1888 AND PT/2016/1889: WHOLESALE LOCAL ACCESS PROVIDED AT A FIXED LOCATION AND WHOLESALE CENTRAL ACCESS PROVIDED AT A FIXED LOCATION FOR MASS-MARKET PRODUCTS - REASONED JUSTIFICATION FOR DECIDING NOT TO AMEND OR WITHDRAW THE DRAFT MEASURE**

#### **1. INTRODUCTION**

On 29 November 2016, the European Commission adopted a Recommendation, in accordance with article 7-A of Directive 2002/21/EC of the European Parliament and of the Council, of 7 March 2002, on a common regulatory framework for electronic communications networks and services («Framework Directive») in Cases PT/2016/1888 and PT/2016/1889: wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products, both in Portugal (hereinafter Recommendation<sup>1</sup>).

This Recommendation follows the serious doubts letter<sup>2</sup> of the European Commission and the consequent phase II investigation on the analysis of the markets for wholesale local access at a fixed location, and wholesale central access provided at a fixed location for mass-market products, further to a process of close collaboration between ANACOM, the European Commission and BEREC (the Body of European Regulators for Electronic Communications).

According to the Recommendation:

1. ANACOM should amend or withdraw the remedies relating to the access obligations imposed on MEO in areas of the wholesale local and central access markets corresponding to NC Areas identified at retail level where, on a forward looking basis, there are limits to the economic feasibility and likelihood of competitive NGA deployment and where there is no alternative wholesale access to NGA permitting sustainable competition, in order to address the Commission's concerns, set out above. In particular, in these areas, ANACOM should impose on MEO a wholesale obligation to provide access to the unbundled fibre line as well as to bitstream over fibre. In doing so, ANACOM should consider whether to grant MEO a degree of pricing flexibility for the fibre access product in line with the Commission Recommendation on Non-discrimination and Costing. ANACOM should also consider to use MEO's commercial offer as a basis for the regulated access products.
2. ANACOM should submit an amended draft measure to the Commission, BEREC and other NRAs without undue delay, having regard to the objectives laid down in article 8 of the Framework Directive, and with particular regard to paragraph 3 d) of the Framework Directive, which requires ANACOM to co-operate with other NRAs, with the Commission and with BEREC so as to ensure the development of consistent regulatory practice.

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<sup>1</sup> Available at:

[https://circabc.europa.eu/sd/a/93505e06-2c02-4cfe-ab54-cbe737a8f0ed/PT-2016-1888-1889%20ADOPTED\\_publication\\_PT.pdf](https://circabc.europa.eu/sd/a/93505e06-2c02-4cfe-ab54-cbe737a8f0ed/PT-2016-1888-1889%20ADOPTED_publication_PT.pdf).

<sup>2</sup> Pursuant to article 7-A, paragraph 1, of the Framework Directive.

4. In accordance with article 7-A, paragraph 7, of the Framework Directive, where ANACOM decides not to amend or withdraw the draft measure on the basis of the Recommendation, it shall provide the Commission with a reasoned justification.
5. In accordance with Article 7-A, paragraph 6, of the Framework Directive, ANACOM shall communicate the adopted draft measure to the Commission by 29 December 2016<sup>3</sup>. This period could be extended, at ANACOM's request, to allow ANACOM to undertake a public consultation in accordance with Article 6 of the Framework Directive<sup>4</sup>.

Having reconsidered the matter, ANACOM believes that the draft decision should not be amended or withdrawn on the basis of the Recommendation, on the grounds presented below, where arguments presented by the European Commission are critically analysed.

This position was submitted to the general consultation procedure, under paragraph 1 of article 8 of the Electronic Communications Law (ECL - Law No. 5/2004, of 10 February, as it stands<sup>5</sup>), and to a prior hearing of stakeholders, under articles 121 *et seq.* of the Code of Administrative Procedure, in both cases for a period of 20 working days, extended for further 5 working days.

Having comments to the public consultation and prior hearing been analysed, a report was prepared, including a summary of contributions received and the Regulatory Authority's views thereon. The report is an integral part of this decision.

## **2. ANALYSIS OF ARGUMENTS OF THE RECOMMENDATION AND REASONED JUSTIFICATION FOR DECIDING NOT TO AMEND OR WITHDRAW THE DRAFT MEASURE**

### **2.1. Non-competitive areas (NC Areas) and predominantly rural areas – geographic market delineation**

The *serious doubts* initially raised by the European Commission, expressed in the letter dated 29.07.2016, focused on obligations imposed in geographic areas identified as a whole as non-competitive (NC Areas).

However, in its Recommendation, the Commission shows concerns primarily related to predominantly rural areas that integrate NC Areas. In fact, after additional data were supplied

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<sup>3</sup> The Commission later clarified that ANACOM should notify the final decision, rather than the adopted draft decision, as in fact provided for in the Framework Directive.

<sup>4</sup> By letter dated 12.12.2016, ANACOM informed the European Commission, under article 7-A, paragraph 6, of the Framework Directive, that in the light of the applicable legal framework, it was required to submit its final decision to a public consultation (prior hearing of stakeholders provided for in article 121 *et seq.* of the Code of Administrative Procedure, and consultation procedure provided for in article 8 of ECL), whereby the Authority required the extension by one month of the deadline for communicating the adopted final decision. The Commission acknowledged receipt of ANACOM's communication on 15.12.2016.

<sup>5</sup> Law No. 5/2004, of 10 February, as amended and republished by Law No. 51/2011, of 13 September, and subsequently amended by Law No. 10/2013, of 28 January, Law No. 42/2013, of 3 July, Decree-Law No. 35/2014, of 7 March, Law No. 82-B/2014, of 31 December, Law No. 127/2015, of 3 September and Law No. 15/2016, of 17 June.

by ANACOM during phase II investigation, provided for in article 7-A of the Framework Directive, the European Commission acknowledged<sup>6</sup>, in its Recommendation, that:

- (a) in some parishes of NC Areas (with demographic and economic characteristics similar to the C areas) there could be greater economic feasibility and likelihood of competitive next generation access networks (NGA) deployment; and
- (b) in other parishes of NC areas, in particular those where open NGA networks deployed with the assistance of State aid give wholesale access to alternative operators, it is likely that sustainable competition could be ensured.

Parishes referred to in points (a) and (b) would thus differ from other NC Areas, of a predominantly rural nature.

In view of the above, the European Commission seems to suggest<sup>7</sup> that ANACOM could consider the possibility of revising the delineation of NC Areas (a revised approach which the Commission would then constructively examine), referring that it is currently only in a position to assess the regulatory approach in the wholesale markets with the geographical scope as notified by ANACOM and that *“such a significant change in the scope of the relevant geographic areas would require ANACOM to submit a revised draft measure for EU consultation”*.

Regardless of the referred revision of the geographic delineation, the European Commission deems it likely that there would remain in any event a significant subset of – especially more rural – parishes with no concrete prospects of either market-driven competitive NGA deployment nor of publicly supported deployment accompanied by wholesale access<sup>8</sup>.

ANACOM weighed the Commission’s arguments for a possible revision of the definition/delineation of relevant geographic markets as notified, to take into account the different characteristics of NC Areas, so as to allow, according to the Commission, the disaggregation of NC Areas and to potentially include in C Areas both parishes where there are open NGA networks deployed with the assistance of State aid and urban parishes (which would require the necessary adjustment of the geographic definition of wholesale markets and/or obligations imposed at wholesale level).

For the reasons indicated below, ANACOM takes the view that the review of criteria underlying the market geographic delineation as notified to the European Commission is not justified.

In this regard, it is recalled that ANACOM, on the basis of factual data on network coverage and market shares, concluded in the notified draft decision, that:

- (a) the retail broadband access market for mass-market products and the wholesale central access provided at a fixed location for mass-market products must be geographically separated into C Areas and NC Areas, according to the following criteria:

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<sup>6</sup> *Vide* §61 of the Recommendation.

<sup>7</sup> *Vide* §61 and §62 of the Recommendation.

<sup>8</sup> *Vide* §62 of the Recommendation.

- C Areas: Parishes where (i) there are at least two alternative operators to MEO, with NGA coverage over 50%; or (ii) there is one alternative operator to MEO with NGA coverage over 50% and MEO's retail broadband access market share is below 50%; and
- NC Areas: Other parishes.

(b) The market for wholesale local access provided at a fixed location has nationwide coverage.

In ANACOM's opinion, the referred criteria (and the geographic delineation resulting from their application), which were based, among other elements, on Commission Recommendation of 20 September 2010 on regulated access to NGA<sup>9</sup> and on Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services<sup>10</sup>, should be maintained, given their robustness in the assessment of the degree of homogeneity of competition in the referred markets/areas, and consequently, in their geographic delineation. It should be highlighted that data broken down by urban and rural areas, defined according to INE's statistical criteria, which ANACOM presented during phase II investigation, were used to demonstrate that the existence of different geographic areas suggests, on a prospective approach, that operator investment will not be spread evenly in those geographic areas over the next two years, and it is likely that in this period investment is more focused on urban areas, while relatively limited in rural areas.

Moreover, the result of a possible revision of the market geographic delineation, as proposed by the European Commission, would not have any impact on the assessment of the matter in question, in the scope of fibre access obligations.

In fact, when assessing obligations to be imposed on wholesale markets, in a framework of geographic segmentation of obligations, ANACOM considered it not proportional to impose access to MEO's optic fibre network, in addition to existing obligations, at national level, of access to ducts and poles (as well as copper network access obligations<sup>11</sup> which this company is also required to meet), obligations which have been fundamental in the investment in NGA on the part of alternative operators to MEO.

Data presented by ANACOM, during phase II investigation, strengthened, in the scope of the assessment of obligations, the referred position that it would be disproportional to impose obligations for access to MEO's optic fibre network in the whole of NC Areas, either in predominantly rural areas, in areas where there are open NGA networks deployed with the assistance of State aid, or in urban areas.

Therefore, the legal framework of obligations which arise, for ANACOM, in the scope of the market analysis and the imposition of regulatory measures, as well as the principle of proportionality, must first and foremost be borne in mind.

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<sup>9</sup> Vide <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010H0572&from=EN>.

<sup>10</sup> Vide [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711(02)&from=EN).

<sup>11</sup> Local loop unbundling (LLU) and "PT ADSL network" offers.

## 2.2. The imposition of regulatory measures and the principle of proportionality

Under the national legal framework that applies to electronic communications - and which transposes the Community regulatory framework to the internal legal order - it is incumbent on ANACOM to define and analyse the relevant markets and to impose on the operator (or operators) designated with Significant Market Power (SMP) the appropriate regulatory obligations (cfr. articles 58, 59 and 66 of the Electronic Communications Law - ECL<sup>12</sup>).

Pursuant to article 55 of ECL, the imposition of specific regulatory obligations must observe the principle of *full reasoning* for their application, ANACOM being required to demonstrate cumulatively that the obligation imposed:

- a) *Is appropriate to the identified problem, and is proportional and justified in the light of the basic objectives set forth in article 5 of the present law;*
- b) *Is objectively justified in respect of the networks, services or infrastructure to which it refers;*
- c) *Does not result in undue discrimination in respect of any other entity;*
- d) *Is transparent in regard to its purposes.*

Article 66<sup>13</sup> lays down also that ANACOM is charged with determining the imposition, maintenance, amendment or withdrawal of obligations in respect of access or interconnection, and when choosing obligations to be imposed, the Authority must opt “(...) *for the appropriate obligations, having regard to the nature of the problem identified, which obligations shall be proportionate and justified according to the objectives set out in article 5*” (cfr. article 66, paragraph 2, of ECL<sup>14</sup>).

Objectives which ANACOM is required to pursue include (i) the promotion of competition in the provision of electronic communications networks and services and associated facilities and services and (ii) the protection of interests of citizens of the European Union (cfr. article 5, paragraph 1, of ECL).

It must be stressed that, in order to achieve regulatory objectives, ANACOM is required to apply proportional regulatory principles in all decisions and measures adopted, being responsible in particular for:

- “c) *Safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition;*
- d) *Promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non-discrimination are*

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<sup>12</sup> Law No. 5/2004, of 10 February, as it stands.

<sup>13</sup> Cfr. article 8, paragraph 4, of the Access Directive.

<sup>14</sup> Cfr. article 8, paragraph 4, of the Access Directive.

*preserved*’ (cfr. article 5, paragraph 1 a) and paragraph 5 c) of ECL<sup>15</sup>; emphasis added).

When considering whether to impose obligations for access to and use of specific network resources, and in particular when assessing whether such obligations would be proportionate to regulatory objectives provided for in article 5 of ECL, ANACOM is required to take account in particular of the following factors (cfr. article 72, paragraph 4, of ECL<sup>16</sup>; emphasis added):

*“a) The technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and/or access involved, including the viability of other upstream access products, such as access to infrastructures, namely to ducts;*

*(...)*

*c) The initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment;*

*d) The need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition”.*

It is noted that in the definition and analysis of markets, in particular in the determination of obligations to be imposed, National Regulatory Authorities (NRA) must have regard to national circumstances (cfr. article 58, paragraph 2, and 59, paragraph 1, of ECL and articles 15, paragraph 3, and 16, paragraph 2, of the Framework Directive). This was explicitly recognised by the European Commission, that, when providing guidelines to NRA on how NGA networks should be regulated, in its Recommendation on regulated access to such networks<sup>17</sup>, specifically referred, in recital (3) that (emphasis added): “(...) *It is therefore appropriate to provide guidance to NRAs aimed at preventing any inappropriate divergence of regulatory approaches, while allowing NRAs to take proper account of national circumstances when designing appropriate remedies”.*

It follows from the above that:

(a) Obligations to be imposed must be based on the nature of the problem identified, they must be proportional and justified according to the relevant regulatory objectives and principles, namely (i) the promotion of infrastructure-based competition, (ii) the promotion of efficient investment and innovation in new and enhanced infrastructures and (iii) the protection of citizen interests. The NRA must specifically consider the viability of other upstream access products, such as access to infrastructures, namely to ducts.

(b) The NRA must not automatically impose a fibre network access obligation on the operator with SMP in market 3a and/or 3b. The Authority must weigh the specific

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<sup>15</sup> Cfr. article 8 of the Framework Directive.

<sup>16</sup> Cfr. article 12, paragraph 2, of the Access Directive.

<sup>17</sup> Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA).

circumstances of the national market and of the case *sub judice* and make a judgement of proportionality as regards the imposition of the referred obligation.

Furthermore, in the framework of national administrative law, ANACOM, being an independent administrative body, is subject in its activity to the principle of proportionality, according to article 7 of the Code of Administrative Procedure<sup>18</sup>, that is, *in pursuing the public interest, (...) must adopt measures that are appropriate to the purposes pursued and its decisions that conflict with subjective rights or legally protected interests of individuals shall only affect such positions to the necessary extent and in proportion to objectives to be fulfilled.*

Legal writings and case-law have densified the principle of proportionality, taking the view that it may be unfolded into the following sub-segments:

(a) *Sub-principle of conformity or suitability of means*

This dimension of the principle of proportionality requires that means will effectively or likely achieve objectives pursued.

It follows from the application of this sub-principle, *in casu*, that regulatory obligations must be a suitable and adequate means to pursue the public interest objective aimed to be safeguarded, as is the case with the promotion of infrastructure-based competition, the promotion of efficient investment and innovation in new and enhanced infrastructures and the protection of citizens (cfr. article 5, paragraph 1, points a) and c) of ECL).

(b) *Sub-principle of requirement, of necessity or indispensability*

In this dimension, regulatory obligations to be imposed shall be those that, within the range of available obligations that appear suitable to pursue regulatory objectives, being indispensable to meet the public interest, produce the lowest degree of injury to the individual's legal sphere, that is, the lowest squeeze of the right subject to restriction.

(c) *Sub-principle of proportionality in a strict sense*

In this dimension, the principle of proportionality requires the weighing of costs and benefits of the objective intended to be pursued.

It is not enough for the regulatory obligation to be necessary, that is, indispensable to the pursue of objectives intended to be achieved. It is fundamental to demonstrate that the advantages of adopting it are as good as or better than the disadvantages resulting from the squeezing of the right at stake.

As such, in the national legal framework that applies to electronic communications, the remedy proves to be the right choice where, being suitable to the intended objective, it is also indispensable and, among the various possible measures, it is the least restrictive; finally, it is necessary that the drawbacks caused by it do not exceed the benefits it produces.

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<sup>18</sup> Approved by Decree-Law No. 4/2015, of 7 January.

The principle of proportionality is also a founding principle of Community legal system<sup>19</sup>. As referred by A. MATTERA:

*“A given measure will only be deemed to be acceptable from the point of view of Community law where, on the one hand, there is an adequate causal link between that measure and the legitimate objective pursued; where, on the other hand, means adopted to achieve that objective are deemed necessary - that is, sufficient and not excessive; and, finally, where there are no other less coercive measures that, sufficing to effectively meet the intended objective, cause less disruption to legal-commercial traffic, being, for this reason, less oppressive for economic operators of the common market”<sup>20</sup>.*

In the light of the legal framework of obligations which NRA are required to meet (in particular, article 7-A, paragraph 7, of the Framework Directive), it must be reliably demonstrated that, under penalty of violation of principles which must guide ANACOM's action, MEO should not be imposed a fibre access obligation in NC Areas - and that, even where a new geographic delineation of these markets was undertaken, this conclusion would remain for the respective predominantly rural areas.

### **2.3. Lack of proportionality of the imposition of an obligation to provide access to MEO's fibre network**

#### **2.3.1. In NC Areas in general**

ANACOM had already argued that the imposition of access to MEO's optic fibre network in NC Areas in general is not proportional - and the Authority maintains this position. In fact:

- (a) Obligations for provision of access to MEO's optic fibre network would be imposed in areas where this operator hardly has any fibre coverage. It is stressed that, in Portugal, the operator with the widest NGA coverage is not MEO, but NOS, and in NC Areas, MEO's coverage is quite low<sup>21</sup>. Competition in terms of high-speed broadband access is based on competition between alternative network infrastructures, and MEO's fibre network coverage is very similar, both in terms of size and location, to that of the third operator (VODAFONE).
- (b) MEO's SMP position is essentially a consequence of its retail market share in copper accesses (ADSL), not fibre (in NC Areas, MEO's market share, in terms of NGA-based access is 31% [and would decrease to 19% if only LTE accesses were taken into account]<sup>22</sup>).
- (c) In the period concerned by this analysis, no problem has been acknowledged in the retail market so as to require the imposition of fibre access measures (in addition to measures for access to ducts, access to poles, access to local loops and access to the PT ADSL Network offer) in the wholesale market.

<sup>19</sup> Cfr. paragraph 4 of article 5 of the Treaty of the European Union and Protocol 2 to the Treaty.

<sup>20</sup> In A. MATTERA, «Le Marché Unique Européen», p.330, Ed. Jupiter.

<sup>21</sup> Only 3% of households cabled by MEO were located in these areas by the end of 2015.

<sup>22</sup> Vide Table A1 of the Statistical Appendix.

- (d) Evidence shows that MEO's dominant position, in copper access, is not an advantage *per se*, as operators that have installed NGA in NC Areas are quickly withdrawing MEO's market share. For example:
- i. MEO's market share has decreased by at least 20 percentage points<sup>23</sup> in 146 parishes included in NC Areas, which had in the 3<sup>rd</sup> quarter of 2014 less 15% NGA coverage, and which achieved coverage provided by an alternative operator in the 3<sup>rd</sup> quarter of 2016<sup>24</sup> - *vide* Table A2 of the Statistical Appendix;
  - ii. MEO's broadband customer database decreased by around 7% in those areas<sup>25</sup>, which means that, not only the market penetration increased, but also that alternative operators were able to win a reasonable number of customers from MEO (i.e. churn), that is, there is no evidence of switching costs likely to block customer mobility and competition.
- (e) The imposition of obligations for access to MEO's fibre network, in NC Areas, could have a negative impact, as it could discourage the company from investing and, at the same time, reduce alternative operators' incentive to invest, as they would wait for the regulated operator's investment<sup>26</sup>. Available empirical evidence suggests a negative impact of access regulation on network investment<sup>27</sup>. In time, this negative impact of access regulation on investment could end up hindering competition in the provision of NGA-based services, precisely on account of the lack of investment in these networks, which is essential for the existence of competition in services that rely on NGA networks<sup>28</sup>.
- (f) Arguments put forward on the lack of appropriateness of the measure also justify why it is not necessary. In this scope, it must also be referred that, in the context of regulatory obligations in force (such as the regulation of access to civil engineering infrastructures - poles and ducts), operators have developed their investment plans

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<sup>23</sup> In the course of this two-year period.

<sup>24</sup> Regardless of whether MEO was able also to achieve coverage in those parishes.

<sup>25</sup> *Vide* Table A2 of the Statistical Appendix.

<sup>26</sup> Bearing in mind the interaction between companies over time, other investment strategies that could be the source of further distortion could be considered.

<sup>27</sup> *Vide*, for example:

- Michał Grajek and Lars-Hendrik Röller, *Regulation and Investment in Network Industries: Evidence from European Telecoms*, The Journal of Law & Economics, vol. 55, n. 1 (Fev. 2012), p. 189-216,
- Tony Shortall and Martin Cave, *Is Symmetric Access Regulation a Policy Choice? Evidence from the Deployment of NGA in Europe*, Communications & Strategies, n. 98, (Apr. 2015), p. 17.
- Klaus Gugler and Wolfgang Briglauer, *The deployment and penetration of high-speed fiber networks and services: Why are EU member states lagging behind?*, Telecommunications Policy, vol. 37, (Nov. 2013), p. 819-835.
- Wolfgang Briglauer, *How EU sector-specific regulations and competition affect migration from old to new communications infrastructure: recent evidence from EU27 member states*, J Regul Econ (2015) 48, p.194–217.

<sup>28</sup> In this respect, it should be referred that MEO has recently restated that its extended coverage plan for the country "assumes that regulatory conditions that enable that investment are maintained, that is, that fibre access obligations are not imposed. A change in this framework implies the reweighting of the investment strategy at the level of Grupo Altice".

dynamically, the Portuguese market occupying a prime position in Europe in terms of NGA coverage.

- (g) The strong regulatory measures imposed by ANACOM at wholesale level in terms of access to ducts and poles (which ANACOM intends to strengthen with the imposition of equivalence of input - EoI) decreased barriers to expansion (reduction of investment costs) and ensured a level playing field for the development of NGA networks, creating similar conditions for the purpose among all operators.

The reinforcement of these measures is a less onerous measure than the fibre access obligation, and it is likely that it will be sufficient to achieve the desired aim.

The strong dynamics of the Portuguese market and changes which have taken place in the sector strengthen ANACOM's position in this matter, without prejudice to the commitment, undertaken and notified to the Commission and to BEREC during phase II, to carefully monitor the respective evolution, in particular in NC Areas, to act quickly by imposing additional measures where appropriate, as well as to anticipate and start, if necessary, the market analysis within 2 years.

Among the recent market developments, it was found that:

- (a) Broadband penetration in NC Areas is still relatively low (around 30% - *vide* Table A3 of the Statistical Appendix) and there are no relevant switching costs, which is evidenced by the ability shown by alternative operators to win the majority of new customers, in the referred areas, as well as by the fact that such operators have withdrawn market share from MEO.
- (b) The market has shown investment and competition dynamics, alternative operators having in fact made NGA investments in NC Areas, covering more households in these areas than MEO. As such:
- i. There are parishes in NC Areas where alternative operators already show a significant NGA coverage degree (namely in predominantly urban areas<sup>29</sup>, where coverage exceeds 50%, and in averagely urban areas, where coverage reaches 33% - *vide* Table A5 of the Statistical Appendix).
  - ii. Moreover, there are open networks, built with public investments, in several parishes in NC Areas.
  - iii. It is not likely that MEO will make any relevant investment in NGA networks in other parishes, that is, in predominantly rural areas, for the duration of the current market analysis (that is, a period of no more than 2 years from the date of approval of this decision). It is natural that, as results from MEO's investment intentions, its investments are focused over the next few years on urban areas, of greater

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<sup>29</sup> According to INE's classification of the national territory per category, according to the degree of urbanisation.

economic interest, and where alternative operators are often already installed, not on rural areas, in average of an lower immediate economic interest<sup>30</sup>.

- (c) Lastly, operators charge uniform prices throughout the national territory for fibre-based offers. If ultimately MEO was the only operator in certain areas, populations in those areas that were its customers would be charged the same prices as customers of the company living in C Areas. This means that it is possible to accept that prices charged by this company in parishes where alternative operators have no relevant NGA presence are constrained by competition incurred in other areas (where several competing NGA exist). This is without prejudice to the fact that alternative operators have options available, such as LTE at a fixed location, to gain market share in these areas. This is an aspect of company policy which ANACOM will continue to analyse.
- (d) In addition, LTE at a fixed location<sup>31</sup> is playing an increasingly important role in these areas, having allowed alternative operators to win broadband customers and to develop a customer database that could facilitate and strengthen the development and sustainable investment in NGA networks. It is noted that, between the 3<sup>rd</sup> quarter of 2014 and the 3<sup>rd</sup> quarter of 2016, 85% of new broadband customers in NC Areas were won by alternative operators, including those with offers based on LTE at a fixed location, and between the 3<sup>rd</sup> quarter of 2014 and the end of 2015, the percentage of new customers won by these operators was already as high as 75%<sup>32</sup>.

In the light of the above, ANACOM takes the view that the imposition on MEO of a fibre access obligation is not proportional, in the specific case of the Portuguese market, given that:

- (a) *It is not appropriate*, as it is not an effective or likely means of achieving the relevant regulatory purposes, as the imposition of this obligation, as referred above and according to available evidence, is likely not to promote, and may even discourage, NGA investment and, consequently, the development of competition, as the latter depends first and foremost on the existence of NGA investment and deployment.

In fact, the purpose of the imposition of access to the fibre optic network of an operator with SMP is primarily the promotion of competition, as it is on the basis of access to this network that other operators would compete in the provision of services to final users.

In this case, what is at stake is the regulation of access to a fibre network that, save for some exceptions, has not been yet deployed. However, an essential element to ensure the development of competition in services (on the basis of the access to the infrastructure of the operator with SMP) is the existence of investment and deployment of the network by the operator concerned. The imposition of the obligation for access to the network of the operator with SMP, before that network is deployed, would be

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<sup>30</sup> According to MEO, in its letter of 16.12.2016 (reference S791), the strategy underlying the FTTH network expansion plan “involves, as a priority, closing the 1.3 million household gap towards cable networks, which shall take place over the next two years”.

<sup>31</sup> Which was not included in the definition of the retail product market but which will be taken into account in terms of the increasing competitive pressure it creates and consequently, in the assessment of obligations to be imposed and respective proportionality.

<sup>32</sup> *Vide* Table A8 of the Statistical Appendix.

appropriate to promote competition only if it actually contributed to ensure that such investment is made, or least, if it did not impair it.

However, a positive relationship has not been yet established between access regulation and investment in access networks on the part of the SMP operator. On the contrary, as referred earlier, some studies suggest a negative relationship between the former and the latter. As such, there is a risk that imposing regulation on access to a fibre optic network that has not been yet deployed will have a negative effect on the investment of the SMP operator.

In this scenario, in parishes where the obligation for fibre access is imposed and where, at the moment, the fibre optic network of the SMP operator has not been yet deployed (that is, most parishes in NC Areas), the imposition of that obligation would not contribute to competition in the provision of services based on access to that fibre optic network, as the referred network has not been, and would not be, deployed.

- (b) *It is not necessary*, given that, within the range of available obligations suitable to pursue regulatory objectives, only the measure that produced the lowest degree of injury in MEO's legal sphere, that is, the lowest squeeze of the right subject to restriction, would be deemed to be necessary.

It is again recalled in this respect that NGA investment in Portugal has shown a significant development in the absence of obligations for access to MEO's fibre network, already involving a very high number of households, on the basis of less intrusive measures, such as the regulation of access to MEO' civil engineering infrastructures - poles and ducts - and the imposition of symmetric access obligations arising from the regime provided for in Decree-Law No. 123/2009, of 21 May<sup>33</sup>, granting operators access to ducts, poles and other installations that belong or which are managed both by bodies operating in the sector, or by bodies that, operating in different sectors, hold infrastructure suitable for the accommodation of electronic communications networks. Investment in NGA has been substantial and has increased in the absence of a fibre access obligation.

The same is true with regard to the development of competition in the referred markets. In fact, parishes at some stage included in NC Areas could be considered as part of C Areas, in particular due to NGA investment by alternative operators, who impose an additional and significant competitive pressure, providing final users, in the referred areas, with a choice of NGA-based services.

It follows from the above that competition and NGA investment have developed even though a fibre access obligation has not been imposed, and it is likely that the trend of reduction of NC Areas continues.

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<sup>33</sup> In this respect, it is highlighted that the draft new Electronic Communications Code under discussion in the European Union provides for a regulatory approach that reflects to a certain degree the regulation model proposed by ANACOM, that gives prominence to the exclusive regulation of access to civil engineering infrastructures and to the imposition of symmetrical obligations; in view of the dynamics in the Portuguese market, it has not been evidenced that these measures are not sufficient.

It is also stressed that the lack of competition in these areas is largely the result of MEO's retail market share in terms of the number of copper accesses (ADSL), not the number of fibre accesses, in the scope of which MEO's market share does not exceed 31% (and if LTE technology was taken into account, it would not exceed 19% - *vide* Table A1 of the Statistical Appendix).

In fact, the SMP operator's NGA coverage is low in these areas and in most of the territory, having alternative operators won market share from it.

Regulatory measures that have proven to be necessary to ensure the development of (infrastructure-based) competition and efficient NGA investment, and which ANACOM proposes to strengthen by imposing obligations of equivalence of input, are, in fact, the obligations of access to ducts and poles, of access to the local loop and to the PT ADSL Network offer, complemented by the symmetric regulation arising from Decree-Law No. 123/2009, of 21 May, as it stands.

- (c) *It is not proportional in a strict sense*, given that even if such remedy was appropriate and necessary - which is not the case - and even if charges imposed on the SMP operator were not taken into consideration, the advantages of its adoption would be lower than disadvantages involved. In fact, net benefits of this measure are uncertain, and there is a risk that they could be zero and negative - as the SMP operator held by the end of 2015 an extremely low percentage of NGA networks deployed in NC Areas (only 3% of households cabled by MEO were located in these areas) - and the obligation imposed could lead to disinvestment in NGA, on the part of MEO or of alternative operators, in NC Areas, as referred earlier.

As such, NGA investment in the referred areas would be impaired without yielding any benefits for final users.

Additional data presented to the European Commission and to BEREC, during Phase II, reinforce ANACOM's view that it would not be proportional to impose a fibre access obligation in the whole of NC Areas, including predominantly rural areas. In fact:

- (a) A significant group of parishes in NC Areas is located in areas classified as predominantly or averagely urban areas (according to the classification made by *Instituto Nacional de Estatística* (INE) of the national territory per category, according to the degree of urbanisation), presenting demographic and economic characteristics similar to those of C Areas and an already significant NGA coverage on the part of alternative operators (in excess of a 1/3<sup>34</sup>). Consequently, and as the European Commission also seems to acknowledge<sup>35</sup>, the imposition of an obligation for access to MEO's fibre network is not justified (not necessary) in these areas.
- (b) Other parishes in NC Areas are already provided with coverage (over 50%) of open NGA networks, deployed with the assistance of State aid, and give wholesale access to alternative operators. In these areas, and as the European Commission also seems

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<sup>34</sup> Double counting already excluded.

<sup>35</sup> *Vide* §61 of the Recommendation.

to acknowledge<sup>35</sup>, the imposition of an obligation for access to MEO's fibre network is not justified.

- (c) In the remaining parishes of NC Areas, classified as predominantly rural areas, the imposition of an obligation for access to MEO's fibre network is not proportional, for the reasons detailed in the following point.

### 2.3.2. In predominantly rural parishes of NC Areas

In these areas, there is a set of socio-economic and demographic indicators - such as the density of dwellings, the average number of households per parish, the average number of households per building, the rate of illiteracy and the ageing index -, from which stems, in principle, a low level of attractiveness for investment, both for MEO and for other operators, namely when compared with the level of attractiveness of other areas.

See the table below:

**Table 1. Socio-economic and demographic indicators in C Areas, in rural parishes with open NGA networks and in predominantly rural parishes of NC Areas (excluding parishes with open NGA networks)**

Parishes	Households per km <sup>2</sup>	Households per parish	Households per building	Rate of illiteracy	Ageing index
C Areas	367	6 994	2.46	4.28%	117
Rural parishes with open NGA networks	27	975	1.13	10.80%	327
NC Areas – PRA	18	641	1.04	12.33%	411

Source: ANACOM on the basis of INE data

These areas (even when compared to parishes where open NGA were deployed, which are also located in rural areas and which received significant public funding that fostered investment in NGA networks) show in average:

- (a) lower population density (around 33% lower);
- (b) fewer households per parish (around 34% lower); and
- (c) fewer households per building, which entails in principle greater costs of investment in NGA networks.

In addition, these areas show a significantly higher rate of illiteracy and ageing index than the average in C Areas and in parishes with open NGA networks, which decreases the potential demand, a fundamental factor in the definition of any operator's business plan.

As such, it is unlikely that any investment is made in predominantly rural areas for the duration of the current market analysis, either on the part of MEO or on the part of other operators, a period which is expected not to exceed 2 years<sup>36</sup>.

In predominantly rural parishes in NC Areas<sup>37</sup>, around 69% of the level of customer increase between the end of 2015 and the 3<sup>rd</sup> quarter of 2016 is due to MEO. However, in case fixed

<sup>36</sup> As referred earlier and conveyed by MEO to ANACOM.

<sup>37</sup> Parishes with open NGA coverage excluded.

LTE accesses in these areas were taken into account, MEO's contribution (to the increase in the number of customers) would merely reach 24%<sup>38</sup>.

In these areas also, all operators are in similar conditions to invest in NGA networks, without prejudice to the fact that public funding may play a relevant role, and there are in fact several parishes in predominantly rural NC Areas where NGA coverage already exceeds 50%, deployed by alternative operators other than DStelecom and Fibroglobal (whose network deployment was significantly subsidized) - *vide* Table 2 in point 2.4.

As such, the solution proposed by the Commission, to impose an access obligation on MEO's fibre network, at least in predominantly rural areas, fails also to observe the principle of proportionality, in the case of the Portuguese market, given that:

- (a) It is not appropriate, as it is not an effective or likely means of achieving the desired purposes - the promotion of competition -, as the imposition of the obligation in areas where MEO hardly has any fibre network coverage (its degree of coverage in predominantly rural parishes in NC Areas is lower than 2% - *vide* Table A4 of the Statistical Appendix), and where it is not the operator with the widest NGA coverage (NOS is), does not solve the problem of lack of investment and competition in these areas; it would rather exacerbate that problem, for the reasons set out above.
- (b) As it is not appropriate, it is not necessary to ensure competitive access of the population to high-speed broadband services. Recent market dynamics suggest, in fact, that within the range of obligations available to ANACOM to pursue regulatory objectives, there are other measures that involve a lower squeeze of MEO's private initiative and which are likely to achieve the same purposes.

The obligations that already fall on MEO, which ANACOM proposes to strengthen during the period of this market analysis, are those that are deemed necessary to pursue regulatory objectives, complemented by the symmetric regulation introduced by Decree-Law No. 123/2009, of 21 May, which is also a key pillar of successful investment in NGA networks in Portugal.

In fact, further to the regulatory approach that has been followed, ANACOM believes that it is essential to continue to guarantee and to reinforce investment conditions for all operators. In parishes where no NGA networks exist, each operator may thus invest under similar circumstances, on the basis of access to ducts and poles. This has been the case so far. In fact, MEO has not even been hitherto the operator that has invested the most in NGA networks in rural areas.

- (c) It should be referred that MEO's gradual loss of market share in NC Areas has also taken place in predominantly rural areas<sup>39</sup>. However, in these areas MEO is under the commercial pressure of offers based on LLU (although operators are not co-located in most exchanges in these areas), the "PT ADSL Network" wholesale offer (and also fixed LTE-based offers, bundled with DTH).

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<sup>38</sup> *Vide* Table A8 of the Statistical Appendix.

<sup>39</sup> Where NGA network investments are not expected to occur for the time being, due to the low attractiveness resulting from the level of return on investment.

- (d) It has been found that in the referred areas there are other means that also promote investment in NGA networks and that allow user access to competitive offers based on other technologies, such as the copper network and LTE at a fixed location. In this regard, it must be referred that:
- i. In the context of the copper network, ANACOM has imposed access obligations both in the market for wholesale local access provided at a fixed location and in the market for wholesale central access provided at a fixed location for mass-market products.
  - ii. The investment in fixed NGA networks could be fostered by state aid, including programmes for expansion of current open NGA networks in rural areas, such as DStelecom's investment plans, under the "Connected Communities Programme" promoted by the European Commission, to support the deployment of NGA networks in regions and cities.
  - iii. Investment in LTE could be ensured through private initiative, in the framework of competition between alternative infrastructures that has characterized the Portuguese market. Nonetheless, so that a universal access is promoted, LTE investment also results from coverage obligations, such as those that ANACOM has imposed in the context of the allocation and renewal of rights for use of frequencies for the provision of mobile communication services.
- (e) Costs arising from the imposition of a measure such as this, with the characteristics recommended by the European Commission<sup>40</sup> (including EoI and economic replicability) are estimated to largely exceed benefits that arise from it, which does not correspond to the minimum burden that may be required from MEO to obtain the intended purpose, both on account of the burden that would be imposed, and also of adverse effects on the investment that the company itself and other operators could make.

It is not enough to consider the imposition of an obligation for access to MEO's fibre network in NC Areas as appropriate and necessary - requirements that, in ANACOM's opinion, have not been met for the reasons set out above. It is fundamental also to weigh costs and benefits against the objective intended to be achieved<sup>41</sup>, that is, competition and sustainable investment in NGA networks.

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<sup>40</sup> Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment. Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:251:0013:0032:EN:PDF>.

<sup>41</sup> *Vide* in this regard the Judgement of the ECJ in Case 265/87: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued."

As such:

- i. In case the obligation for access to the fibre network is not imposed in predominantly rural areas, and the practise of uniform tariff adopted so far throughout the national territory remains, users in these areas will benefit from the same prices and conditions charged by MEO in C Areas.
- ii. Obligations (symmetrical and asymmetrical) already in force in markets under consideration, which ANACOM intends to reinforce in the very short term, such as the access to ducts and poles (with an extensive network in the national territory<sup>42</sup>), at very low prices in the framework of regulated offers (RDAO/DPAO) and the strict regulation of access to infrastructures in buildings, correspond to the minimum burden imposed on the regulated company, in the light of objectives intended to be achieved. These measures, as well as the existence of multiple points of presence of alternative operators on national territory, ensure by themselves similar conditions for construction and investment in NGA networks for all operators, thereby guaranteeing a level playing field in terms of access to the market and investment in NGA networks. In this regard, the European Commission declared in its Impact Assessment on the proposal for a Directive establishing the new European Electronic Communications Code<sup>43</sup> that NRAs will be required to choose the most proportionate and effective obligation to be imposed on the SMP operator, prioritizing the exclusive application of an obligation for access to civil engineering infrastructures<sup>44</sup>. BEREC also acknowledges<sup>45</sup> that access to these infrastructures, where available, has encouraged investment both on part of the incumbent and of alternative operators.
- iii. In case the obligation for access to the fibre network was imposed in the referred areas, MEO being bound to ensure the economic replicability of the offer, the company could decide to increase the retail price of offers provided in predominantly rural parishes of NC Areas (tariff uniformity likely being broken<sup>46</sup>), so as to eliminate the negative margin in the supply of wholesale services<sup>47</sup>, even

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<sup>42</sup> Of a few tens of thousands of kilometres, in NC Areas.

<sup>43</sup> Vide <https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>.

<sup>44</sup> The referred Impact Assessment determines as follows: “NRAs would be required to choose the most proportionate and effective SMP remedy or combination of remedies where necessary, with initial priority to a stand-alone access remedy to civil engineering (e.g. duct access)”.

<sup>45</sup> The report *Challenges and drivers of NGA rollout and infrastructure competition* refers as follows: “Where ducts are available, access to this infrastructure incentivises alternative operators’ as well as incumbent operator’s fibre rollout. With the deployment of parallel fibre networks, regulation could be limited or reduced to duct access (PT, some areas in ES) and with co-investment schemes, regulation could be limited to (symmetric) passive access and duct access (FR)”.

<sup>46</sup> This was in fact the case with the regulation of the PT ADSL Network offer, in the scope of which MEO opted to break retail tariff uniformity.

<sup>47</sup> As explained in more detail in a separate section of this document.

where the use of that regulated offer by third parties was low, to the detriment of users in those areas (who would incur in a higher price<sup>48</sup>).

MEO could decide not to invest in NGA networks in these areas - in case it is regulated -, to the detriment of users, given that, in case other operators decide also not to invest, users are deprived of access to NGA networks and, consequently, of competition.

- iv. Having weighted costs and benefits against the imposition of a remedy for access to MEO's fibre network in predominantly rural areas, ANACOM takes the view that this measure is not proportional in the specific case of the Portuguese market. It is stressed that the issue at stake is not whether to impose obligations for access on the operator with SMP, but rather the type of and scope of obligations to be imposed - that is, at the level of access to civil engineering infrastructures (ducts and poles) or also at the level of access to the fibre network.

The imposition of obligations for access to fibre networks in predominantly rural parishes, where the operator that would be subject to such obligation has not yet deployed such networks, seems to be a preventive type of regulation. As the issue concerns the safeguard of an improbable event whose adverse consequences (in the unlikely event that it did occur) could be reverted through measures that should be adopted only in case it effectively took place, it is deemed that it would be excessive (as the principle of proportionality would thereby be violated) to impose those obligations just yet.

#### **2.4. Main drivers of economic viability of investment in NGA networks**

The Commission considers<sup>49</sup> that in order to demonstrate that there is a business case for alternative operators to deploy fibre relying solely on a regulated access to ducts and poles, ANACOM should examine further the main drivers of economic viability of such deployments. According to the Commission, this economic viability assessment could, for example, quantify the investment required per customer, taking into account *inter alia* the density of population, the expected average revenue per user, as well as the critical penetration rate.

The Commission further suggests that the significant deployment of NGA networks in C Areas should provide ample evidence of the threshold values regarded as acceptable by the various operators active in the market and should also give insight on the take-up levels that can be expected following deployment, thereby reducing over time the related uncertainties about returns on investment.

As acknowledged<sup>50</sup> by the Commission, operators may prioritize investment in NGA networks step-wise, such that "*a purely static delineation [of geographic market areas] based on actual deployments to date may not fully capture the potential over a market review period for efficient infrastructure competition.*"

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<sup>48</sup> In fact, MEO will have higher costs in the provision of the service in these areas compared to costs borne in C Areas, and may inclusively charge a retail price that does not cover costs in these areas (although average costs of providing the service, at national level, may be covered).

<sup>49</sup> *Vide* §65 of the Recommendation.

<sup>50</sup> *Vide* §61 of the Recommendation.

The suggestion made by the Commission would lead to a static assessment of investment conditions where, on the basis of current investment on NGA networks, indicators that were on the basis of that investment would be identified, the respective threshold being extrapolated from such indicators so that areas that could prospectively be covered by these networks were then identified.

In the first place, as ANACOM explained earlier, as the regulated access to ducts and poles has been imposed and access obligations to symmetrical civil infrastructures are in force, the various operators (MEO and alternative operators) are on a level playing field for the purpose of investment in NGA networks. ANACOM does not dispose of data that allow the conclusion that MEO would bear lower costs, greater efficiency, higher profits or another type of advantages compared to other operators active on the market, leading the viability of its investment in NGA networks to be significantly different from alternative operators' viability of investment. On the one hand, NGA coverage in C Areas by alternative operators is more extensive than MEO's (the alternative operator with the highest coverage degree covers around four times more households than MEO<sup>51</sup>). On the other hand, no operator, even if it was not the first to cover a given area with NGA networks, is deprived of the possibility of winning customers over in that area, as data from the last few years has demonstrated. In fact, VODAFONE has been the operator that has won the highest number of broadband customers, although it was the third, or fourth, operator to be able to cover the majority of areas with NGA networks. In this context, the fact that MEO has a database of ADSL customers is not a decisive advantage for the purpose of investment in NGA networks.

In the second place, although the density of population could be a relevant factor in the decision to prioritize investment in NGA networks, the threshold limit that justified that investment, or not, is not clear, as the definition of such thresholds depends on various factors and on each operators' strategy. Nor is it evident that there could not be other factors that justified investment in a specific parish, even with a relatively low population density. In fact, there is a large and diversified range of factors that could justify the option for investing in NGA networks in a given area, which do not concern the issue of population density, and the weight given by each operator to each factor in a given moment it is not evident, or necessarily the same.

In this regard, it is stressed that there are several parishes where NGA coverage already exists (provided by alternative operators other than DStelecom and Fibroglobal, whose network deployment was significantly subsidized) and which present a set of socio-economic and demographic indicators that, for the most part, compare unfavourably with indicators for rural parishes with open NGA networks.

All examples presented below concern predominantly rural parishes where at least one alternative operator with over 50% NGA coverage exists (only the rate of illiteracy and ageing index show significant positive deviation):

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<sup>51</sup> With reference to the end of 2015.

**Table 2. Examples of socio-economic and demographic indicators in predominantly rural parishes where alternative operators have already invested in NGA networks**

Parishes	Households per km <sup>2</sup>	Households per parish	Households per building	Rate of illiteracy (%) <sup>52</sup>	Ageing index <sup>53</sup>
Rural parishes with open NGA networks	27	975	1.13	10.8	327
040218	13	246	1.08	8.8	272
430201	15	598	1.02	5.0	126
430110	19	396	1.03	3.4	58
420603	28	271	1.00	7.0	72
430109	31	925	1.04	3.3	69
430114	32	796	1.05	2.6	54
420601	35	653	1.03	7.1	52
430119	38	921	1.02	4.7	84
470110	40	366	1.01	2.2	79

Source: ANACOM on the basis of data provided by operators and INE

In all these parishes, MEO's NGA coverage is residual (below 2%, except for a single case where it slightly exceeds 10%), and, as stated earlier, an alternative operator with over 50% coverage exists.

Data in the table above thus demonstrate that operators that decided to invest in parishes listed above consider them to be attractive, having thus included them in their investment plan. As such, it would be over-simplistic, unrealistic and manifestly inappropriate to define an identical set of indicators and respective thresholds for the various operators, and all the more so given that there are variables and objectives associated to each strategy that only each operator is aware of and is able to weight.

Therefore, the probability of investment, in a given period of time and for a specific geographic area, may not be restricted to a limited set of indicators or, should this be the case, it would always have to be understood merely as an analysis exercise, in particular for the identification of influence variables and their degree. For example, the rationale for an important part of investment made by certain operators could have been to invest in areas already covered by other operators (in particular where covered by the operator with the largest NGA coverage at national level) regardless of socio-economic or demographic factors, or factors of any other sort; in other cases, the operator could have avoided investing in those areas and opted to invest in adjoining areas rather than overlapping ones. On the other hand, certain areas could have been covered by NGA networks due to factors associated to other markets (such as the high-quality access market, where the existence of industrial estates, for example, could have been the driver for investment).

<sup>52</sup> Relation between the resident population aged 10 or more that is unable to read and write, that is, unable to read and understand a written sentence or to write a whole sentence, and the resident population aged 10 or more. Source: INE.

<sup>53</sup> Relation between the ageing population and young people, defined as the ratio between the number of persons aged 65 or more and the number of persons up to the age of 14. Source: INE.

Strictly speaking, it would be important to estimate demand and the respective trend over the lifetime of the investment, per parish, which is a difficult exercise and a substantial source of uncertainty, in addition to traditional asymmetric information problems which regulatory authorities also face. For example, in parishes at stake there will certainly be different economic dynamics over the next few years. For example, some could be the destination of touristic projects, which could be interesting opportunities for NGA-based (and LTE-based) services. In other parishes, projects of an industrial, storage and transport nature could be important sources of demand that justify investment. On the contrary, it should not be excluded that in many parishes only the current levels of demand will remain, or even decrease, significant opportunities for investment not opening up in such areas.

Consequently, there are multiple strategies, that can vary over time, to be taken into account when deciding to invest in NGA networks and which do not stem exclusively from the density of population, the average revenue per user, or the critical penetration rate, thus the exercise suggested by the Commission would always lack a minimum level of reliability and could lead to counterproductive results.

The Portuguese case shows, in fact, strong investment dynamics, which have resulted in increased competition and which have also expanded to more rural areas - which may be inferred from data received in the meantime by ANACOM. As such, data for the period between the end of 2015 and the 3<sup>rd</sup> quarter of 2016 reinforce conclusions regarding:

- (a) The high level of competition in C Areas: MEO's market share decreased from 36% to 34% (excluding LTE accesses at a fixed location<sup>54</sup> - *vide* Table A1 of the Statistical Appendix).
- (b) The expansion of investment by alternative operators in NGA networks, in NC Areas, is inevitable, given that the operator currently with the largest NGA coverage is an alternative operator who has practically covered all C Areas. As such, 39% of new households covered by alternative operators in the reporting period concerned NC Areas (*vide* Table A6 of the Statistical Appendix). On the other hand, the number of households covered in this period, in these areas, by alternative operators and by MEO was almost the same, with a total exceeding 300 thousand households.
- (c) Alternative operators have won more customers than MEO, inclusively in NC Areas - in these areas, and in the period under consideration, alternative operators have increased the number of broadband accesses in a few tens of thousands. On its turn, MEO suffered a reduction (although a slight one) in the number of broadband accesses.
- (d) The gradual decrease of MEO's market share in NC Areas, from 84% to 80% (fixed LTE accesses not included)<sup>55</sup> - *vide* Table A1 of the Statistical Appendix).

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<sup>54</sup> If these accesses were included, MEO's market share would decrease from 35% to 33% (it stood at 39% by the 3<sup>rd</sup> quarter of 2014) - *vide* Table A1 of the Statistical Appendix).

<sup>55</sup> If these accesses were included, MEO's market share would decrease from 72% to 67%. It is stressed that, compared to the 3<sup>rd</sup> quarter of 2014, that is, in two years, MEO lost 11 market share points - *vide* Table A1 of the Statistical Appendix.

- (e) The gradual coverage of NC Areas, having alternative operators increased their coverage in the areas by around 8 points between the 3<sup>rd</sup> quarter of 2014 and the 3<sup>rd</sup> quarter of 2016 (double counting included)<sup>56</sup> or by around 5 percentage points, excluding double counting<sup>57</sup>. By the end of the period under consideration, alternative operators had over 33% coverage of these areas (double counting not included)<sup>58</sup>.
- (f) In addition, the impact of LTE technology on the ability of alternative operators to win over MEO's customers must be taken into account. In that period, 44% of new broadband accesses by alternative operators were based on LTE at a fixed location. As a result, in the 3<sup>rd</sup> quarter of 2016, 50% of all broadband accesses of alternative operators in NC Areas were based on that technology.

In the face of these dynamics, ANACOM committed itself, during Phase II investigation, to BEREC and the European Commission, to monitor the market and to perform a new market analysis within 2 years at the most. In the view of this Authority, this is the approach that best safeguards competition and investment in NGA networks, as it is adequate, necessary and proportional, when compared to the option recommended by the European Commission (the imposition of an obligation for access to MEO's fibre network, even in areas where that network practically does not exist at present). This option involves regulatory action of a preventive nature, which is not legitimised by the risk intended to be protected - a risk that, as referred, is low, and which, were it to materialise, could be remedied through additional regulatory measures.

## **2.5. Co-investment**

According to the European Commission<sup>59</sup>, in assessing the prospects of competitive deployment, it is opportune to consider whether co-investment would be able to lower the threshold deemed to be acceptable for investment by the various operators active on the market.

The Commission refers that, if ANACOM's draft measures were adopted, it would not be likely that MEO offered co-investment opportunities to alternative operators similar to those previously agreed in C Areas. It also refers no evidence is available to the Commission as to the possibility that a co-investment agreement in NC areas could be reached between Vodafone and NOS.

ANACOM does not dispose of data on whether: (i) whether MEO is able, in certain NC Areas, to conclude co-investment agreements with any other operator; or (ii) whether alternative operators - such as VODAFONE and NOS - will conclude co-investment agreements in NC Areas. These assumptions - which ANACOM acknowledges that would allow increased competition in NC Areas - were not<sup>60</sup> relevant factors in the assessment of the proportionality of the imposition of obligations for access to MEO's fibre network. However, there have been co-investment agreements in the past, both between NOS - then Optimus - and VODAFONE,

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<sup>56</sup> Vide Table A4 of the Statistical Appendix.

<sup>57</sup> Vide Table A5 of the Statistical Appendix.

<sup>58</sup> Vide Table A5 of the Statistical Appendix.

<sup>59</sup> Vide §66 of the Recommendation.

<sup>60</sup> Such as MEO's business offer, that may facilitate competition in these areas, but which was not a relevant factor for the decision.

and between MEO and VODAFONE, however it is not clear whether such agreements will exist again. It must be referred, nevertheless, that these agreements had a significant, but not decisive, role in the deployment of NGA networks in Portugal - covering only 13% of all NGA network accesses (all operators included) that existed by the 3<sup>rd</sup> quarter of 2016.

The imposition of access (to the fibre network) may even discourage co-investment solutions, given that, in this case, alternative operators would have an option, depending on the conditions, to provide retail services without being required to incur in (co-)investment costs or to promote initiatives for that purpose.

## **2.6. Commercial offer of access to MEO's fibre network**

The European Commission refers<sup>61</sup>, that during the *process of close cooperation*, ANACOM provided only limited information regarding the commercial offer of MEO, failing to present a thorough analysis as to the reasonableness of its access conditions. According to the Commission, ANACOM claimed that the existence of this commercial offer was not, *per se*, a relevant factor to conclude that imposing a fibre access obligation on MEO at wholesale level in NC areas would not be necessary, adequate or proportional. The Commission considers that ANACOM should carry out a thorough analysis of the referred commercial offer in order to have a complete overview of the competitive conditions in NC areas.

ANACOM restates that, in fact, the existence of that offer was not a decisive factor in the assessment of whether it was proportional to impose an obligation for access to MEO's fibre network.

In any event, it informed the European Commission and BEREC, during Phase II, that negotiations were under way between MEO and several operators as regards the use of that commercial offer, which could result in different conditions than those presented in the initial version published on March 2016.

This was in fact the case with:

- (a) The publication, on 24.11.2016, of a new version of the offer Access PON PT, which was substantially revised and improved in its technical, procedural and commercial aspects<sup>62</sup>.
- (b) The conclusion of a memorandum of understanding between MEO and NOWO<sup>63</sup>, so that the latter could start using the offer Access PON PT.

The most relevant changes introduced in the offer were as follows:

- (a) Granularity: minimum capacity of 4 ports per PDO, contracted capacity being able to differ from one PDO to another, instead of the 30%, 60% or 90% percentage of addressable households per PDO, that applied equally to all PDO of the PON network, in force in the former version of the offer.

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<sup>61</sup> Vide §73 of the Recommendation.

<sup>62</sup> Vide offer at

<http://ptwholesale.pt/pt/servicos-nacionais/infraestruturas/Documents/Access%20PON%20PT.pdf>.

<sup>63</sup> I.e. Cabovisão.

- (b) Coverage information: clarification of deadlines for provision of coverage information (once a month MEO is required to provide users of the offer with information on parishes with household coverage over 80%).
- (c) Levels of quality of service: integration of LQS2 (maximum installation time for an access to JSO) in LQS1 (maximum installation time for PON-JSO Network and respective PDO, to also include access to JSO), which decreases from 90 to 60 days from the date of receipt of the application.
- (d) Prices: Installation price that decreases cumulatively with the volume of ports that are contracted and application of an average monthly discount that increases cumulatively according to the pool.

MEO also restated<sup>64</sup> that it was fully available and interested to pursue talks with operators to promote the use of the Access PON PT offer.

The Commission declared<sup>65</sup> that “*during the phase II investigation it has become clear that, to date, there is no take-up of MEO’s commercial offer, although negotiations have taken place between MEO and alternative operators.*”

However, negotiations concerned by the above-mentioned memorandum of understanding between MEO and ONI are underway to implement the effective use of the Access PON PT offer by ONI, which suggests some degree of evolution compared to the information conveyed by the European Commission.

Moreover, all aspects which gave the Commission cause for concern (identified in §74 of the Recommendation) were amended in the revised version of the offer presented by MEO on 24.11.2016. As such:

- (a) “*The commercial offer would require alternative operators to connect to MEO’s network on capacity steps of 30%*” - MEO reduced granularity, the minimum capacity now corresponding to 4 ports per PDO, contracted capacity being able to differ from one PDO to another, instead of the 30%, 60% or 90% percentage of addressable households per PDO, that applied equally to all PDO of the PON network.
- (b) “*Also, when a customer is lost or when an alternative operator fails to acquire the customer, the access seeker is obliged to continue paying for the unused capacity during a minimum of 5 years*” - MEO decreased the minimum time in each port associated to a PON Network from 5 to 2 years.
- (c) “*As to the economic conditions, an alternative operator considers the prices MEO is proposing to be unreasonable and disproportionate and to lead to a margin squeeze while facing the disadvantage of a significantly smaller customer base*” - MEO decreased the installation price from 247.50€ to at least 200€ (price of the first step), the price decreasing cumulatively with the volume of ports that are contracted (the last

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<sup>64</sup> In its letter dated 25.11.2016, in which MEO communicated changes to the Access PON PT offer, the company referred that “it informed all operators with a potential interest in the new version of the offer, having restated its full willingness and interest to continue talks intended to promote the use of the Access PON PT offer”.

<sup>65</sup> Vide §74.

step being charged 150€, corresponding to a pool exceeding 75.001 ports). MEO also introduced an average monthly discount that increases cumulatively according to the pool and which reaches 25% in the last step (number of contracted ports in excess of 75.001).

The European Commission considers<sup>66</sup> also that, given that it appears that MEO is prepared to voluntarily grant access to its fibre network and that alternative operators are reportedly willing to take up a reasonable offer, a tailored regulated access to fibre would not be a disruptive remedy. On the contrary, the Commission supports that such a regulatory approach would be coherent with the current market developments and would allow ANACOM to complement and regulate currently disputed elements of MEO's existing commercial offer, rather than replace it, in the event that MEO does not itself unilaterally improve that offer.

However, MEO improved its commercial offer on its own initiative and declared its willingness to hold additional negotiations, and there was in fact an operator with whom a memorandum of understanding for the use of the offer was concluded. It does not appear to be in MEO's interest not to have demand for its commercial offer (otherwise, it would not have developed it and would not be available for negotiations that have been held) and that remedies now under discussion are imposed in the next market analysis, in case market conditions so recommend.

It is noted that MEO's commercial offer, in the last published version<sup>67</sup>, already takes into account several concerns expressed by other operators and in some way incorporates the Commission's suggestion that models used, for example, in Germany and the Netherlands, which provide for long-term access to infrastructure based on up-front payments as a way of risk-sharing, as well as for volume discounts, are followed. It would thus be unnecessarily intrusive and premature to regulate the offer at this stage.

## **2.7. Role of LTE accesses at a fixed location as competitive constrain on MEO in NC Areas at retail level**

The European Commission comments the reference made by ANACOM, in the course of phase II, to the role of LTE accesses at a fixed location as a competitive constraint on MEO in NC Areas at retail level.

The Commission recognises that:

- (a) Offers based on fixed LTE are on a significant growth trajectory, and begin to play a role which may become even more considerable in the future<sup>68</sup>.
- (b) Such services could be a basis for the two main alternative operators, which also have mobile arms, to build retail market share in NC areas, including the more rural parts, on more favourable economic terms than through the regulated local loop offer, which is not intensively exploited by them and is declining in significance.

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<sup>66</sup> *Vide* §78 of the Recommendation.

<sup>67</sup> On 24.11.2016.

<sup>68</sup> In particular, because they present better performance characteristics than MEO's copper network.

- (c) A retail market position built up in this way over time could also serve as a “springboard” for customer migration to NGA, and thus to sustainable NGA deployment in at least some parts of NC Areas.

However, the Commission also notes that in ANACOM’s draft measure, fixed LTE accesses were not considered to be part of the relevant retail market and not taken into account as an indirect competitive constraint on MEO. Therefore, this limits the way in which the Commission can take this factor into account in the present case.

ANACOM believes that relations of substitutability between services based on (fixed) LTE and those based on other broadband technologies should be assessed as data available allows more evident conclusions to be made on this matter.

As such, ANACOM maintains the position not to include LTE-based fixed broadband accesses in the relevant market. Notwithstanding, it has been found that alternative operators (in particular NOS and VODAFONE) have provided their customers with these offers and thus increased competitive constraints on MEO, especially in NC Areas. Although in overall terms the number of LTE-based fixed broadband accesses is still relatively low, it already represents 18% of the total number of these accesses in predominantly rural areas<sup>69</sup> and 83% of such accesses of alternative operators in those areas. This aspect cannot fail to be prospectively taken into account when assessing whether it is proportional to impose regulatory obligations on MEO, namely the obligation for access to the fibre network in NC Areas.

LTE offers at a fixed location allow alternative operators, in fact, to compete with MEO offers, namely in NC Areas. Between the 3<sup>rd</sup> quarter of 2014 and the end of 2015, around 75% of new broadband subscribers in NC Areas were acquired by alternative operators and only 25% were won by MEO<sup>70</sup>.

The increasing importance of LTE in these areas was also verified in the first nine months of 2016, during which MEO registered a decrease (although a slight one) in the absolute number of broadband customers in NC Areas, having the number of broadband customers of alternative operators in the referred areas increased by around 65 thousand, to a large extent (45% of accesses) due to fixed LTE.

This fact is even more relevant when it is noted that MEO increased the number of fibre-cabled households in these areas and in the course of this period by more than one hundred thousand. Even in predominantly rural parishes of NC Areas, alternative operators won in the same period a number of new customers around three times higher than MEO (including customers based on fixed LTE). If these customers are excluded, the number of customers won by alternative operators and MEO is the same.

Retail prices of offers based on fixed LTE are very similar to prices of comparable MEO NGA-based offers (fibre optic) and more attractive when compared to ADSL-based offers:

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<sup>69</sup> According to data from the 3<sup>rd</sup> quarter of 2016.

<sup>70</sup> *Vide* Table A7 of the Statistical Appendix.

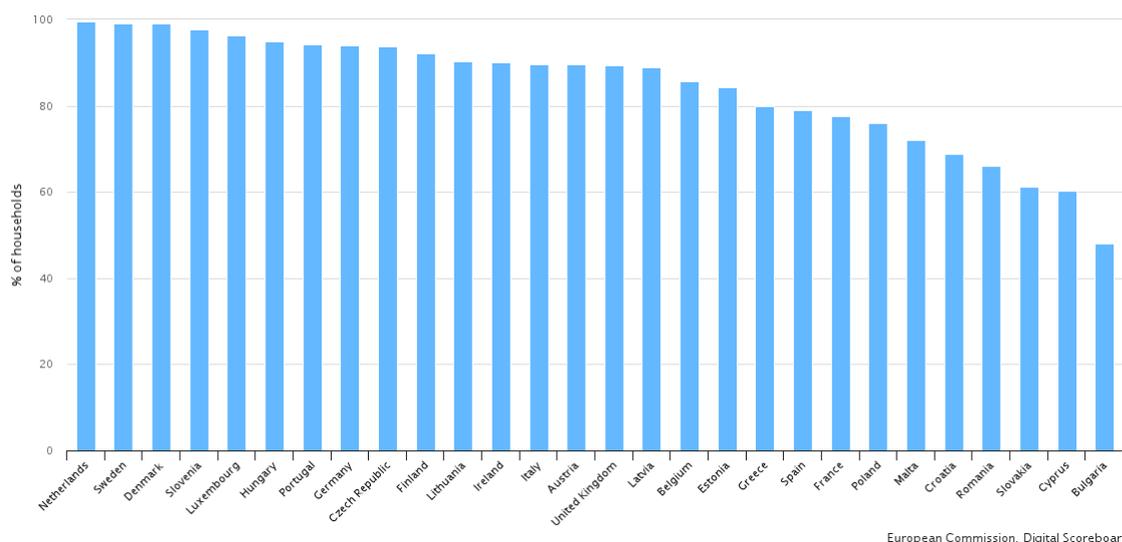
**Table 3. Examples of (fixed) LTE offers, fibre offers and ADSL offers (August and September 2016)**

Offers	Technology	TV channels	Maximum download speed [Mbps]	Price [Euros]
<b>2P (BL + SFT)</b>				
NOS	LTE	–	40	37.98
VDF	LTE	–	100	37.30
MEO	ADSL	–	24	45.98
<b>3P</b>				
NOS	LTE+DTH	80	40	47.49
NOS	DOCSIS3.0	119	100	44.99
MEO	FTTH	72	100	49.99
MEO	ADSL	69	24	49.99
<b>4P</b>				
NOS	LTE+DTH	73	40	54.40
NOS	DOCSIS3.0	119	100	56.99
MEO	FTTH	72	100	56.99
MEO	ADSL	69	24	56.99

Source: ANACOM on the basis of information from operator websites.

Furthermore, Portugal is a particular case at European level, with an excellent level of fixed NGA coverage (the level of coverage by alternative operators being the highest in Europe) and one of the highest levels of LTE coverage at European level (in this last case, close to 100%):

**Figure 1. 4G mobile broadband coverage (LTE) - in % of households (2015)**



Bearing in mind LTE coverage publicized by NOS and VODAFONE (who are also the alternative operators with the largest fixed NGA coverage), more than 80% of the Portuguese population has LTE coverage provided by these operators, enjoying access speeds up to 150 Mbps. The average LTE access speed (weighed by population in each parish) in NC Areas

exceeds 50 Mbps (offers made available by VODAFONE) and 100 Mbps (offers made available by NOS):

**Table 4: Population coverage of LTE offers made available by NOS and VODAFONE per access speeds in NC Areas (August 2016)**

% of the population covered with:	NOS		Vodafone	
	NC Areas	NC Areas excluding rural NGA areas	NC Areas	NC Areas excluding rural NGA areas
≤ 21.6 Mbps	23%	20%	57%	54%
43.2 Mbps	0%	0%	14%	15%
150 Mbps	77%	80%	29%	31%
Average speed (Mbps)	117.4	121.7	53.8	57.3

Source: ANACOM on the basis of information from operator websites.

The role that fixed LTE offers have played in the acquisition of broadband customers by alternative operators in NC Areas - which is also a specificity, albeit a recent one, of the Portuguese market - enables these operators to strengthen a relevant customer database which will facilitate the sustainable investment and development of fixed NGA networks in these areas.

The European Commission refers<sup>71</sup> that ANACOM would need to address questions as to the ability of an LTE-based offer to compete in a market where triple-play offers increasingly predominate at the retail level, in particular by taking into account how additional costs for satellite delivery would affect the sustainability of such offers.

It has been found that, even with LTE limitations as regards the provision of the (pay-)TV service, NOS has been able to overcome the situation by using the DTH service. The combination of fixed LTE and DTH has made it possible to provide triple play e quadruple play offers even in NC Areas. In this case, as NOS is already provided with satellite capacity for the transmission of TV programme services, it has no additional costs in the supply of satellite services, except for the installation of the antenna, the cost of which is usually passed on to the final user. Without prejudice, there are, at national level, more than 600 thousand DTH-based pay-TV customers, and no information exists that shows that the use of this technology has affected the sustainability of offers of operators that resort to them. On the contrary: operators use this technology precisely to enjoy a more extensive territorial coverage, being thus able to address customers which would otherwise be deprived from the access to a pay-TV offer<sup>72</sup>.

Unlike MEO and NOS, VODAFONE has opted not to ensure national coverage of the TV service, namely by using the DTH service. However:

<sup>71</sup> Vide §67 of the Recommendation.

<sup>72</sup> In this scope, it is recalled that there was in the past another operator (TVTel), that invested in fibre optic in a limited set of areas, registering in 2007 more than two hundred thousand households with fibre coverage, and that also opted, to complement its fixed NGA network, to supply DTH-based pay-TV services. This operator showed positive net results in the years immediately preceding its acquisition by the then TV Cabo.

- (a) Even without a TV service, in the first nine months of 2016, VODAFONE increased the number of LTE accesses in NC Areas by around ten thousand, around half of additional LTE accesses provided by NOS, in a period where MEO decreased its number of broadband accesses - which appears to evidence that VODAFONE did not suffer any competitive constrain from MEO, quite the opposite;
- (b) Limitations invoked by the European Commission on whether LTE offers (without the associated DTH service) are able to compete with triple play offers are similar to limitations that exist (in NC Areas) as regards copper-based offers. In fact, in these areas, the IPTV service shows relevant limitations, both due to the length of the copper line, and to the fact that the copper network presents technical conditions that are more prone to failures and interferences, which in some cases are not compatible with some of the demands of TV services, where high levels of availability and low levels of variation of network technical parameters (such as jitter sensibility) are required. In fact, the percentage of DTH-based pay-TV accesses, in the total of pay-TV accesses is, in NC Areas, far greater than in other areas of the country;
- (c) As far as is known, there are no limitations in the access to satellite capacity (such as *Hispasat*).

## **2.8. Source of the competition problem in NC Areas**

According to the Recommendation<sup>73</sup>, ANACOM argues that regulating fibre in NC Areas would be disproportionate, in particular due to the fact that:

- (a) the competition problem identified stems from MEO's market share of copper-based broadband subscribers;
- (b) MEO's fibre roll-out in NC Areas is very limited and significantly lower than that of alternative operators;
- (c) The lack of market saturation in NC Areas and the customers' ability to switch providers; and
- (d) the lack of retail market failures (regarding NGA offers both in C and NC Areas).

The Commission stresses<sup>74</sup> that both fibre and copper are part of the relevant market, and that MEO has a very high market share in NC Areas (84% - *vide* Table A1 of the Statistical Appendix) at retail level, having already built some tens of thousands of fibre lines in these areas.

The Commission remains of the view, based on the evidence available, that the imposition of an access remedy on an existing infrastructure appears to be justified in at least a part of the wholesale local access market which corresponds to the predominantly rural NC Areas (identified at retail level) in view of the need to safeguard competition, in particular where MEO intends to deploy at a larger scale and eventually replace the existing copper infrastructure.

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<sup>73</sup> *Vide* §69.

<sup>74</sup> *Vide* §70 of the Recommendation.

ANACOM disagrees with this view, for the reasons explained earlier, and developed in point 2.3, on the basis of the lack of proportionality of the imposition of the measure under consideration, and which are summarized below.

In the first place, only a very residual percentage of MEO's fibre optic accesses are located in NC Areas. As such, although both fibre and copper are part of the relevant market, the imposition of a remedy involving access to MEO's fibre network, in these areas, would imply imposing access to an infrastructure which is, at present, practically non-existent<sup>75</sup>. Contrary to what the Commission refers, in NC Areas MEO practically does not have a fibre network. The Commission declares that MEO has "already" installed a certain amount of fibre accesses in these areas, however such accesses "only" concern 3% of the total number of fibre accesses installed by MEO at national level. It should also be referred that NOS' NGA coverage, by the end of 2015, was four times more extensive than MEO's in NC Areas. The imposition of fibre access obligations in such a small number of accesses, with the consequent EoI and economic replicability, could have a significant impact at the level of prices practised by MEO in C Areas, thus distorting competition in those areas, as detailed infra in the section on the economic replicability test (cfr. point 2.9).

Still on the current irrelevance of MEO's fibre network, the imposition of access to the fibre network, even in predominantly rural parishes of NC Areas, does not appear to be justified. It is not evidenced, nor has it been duly explained by the European Commission, how economic replicability obligations would fit in with a possible fibre access obligation that takes into account the specificities of areas concerned (that is, a lower density of population and higher unit costs, lower income, levels of digital literacy or broadband penetration).

In the second place, NOS, not MEO, is the operator with the highest number of NGA cabled households in NC Areas (both urban and predominantly rural) and, consequently, the operator with most broadband customers based on these networks, thus the measure suggested by the European Commission (fibre access) would be imposed on the challenger in this type of networks, introducing market distortions. In fact, on the basis of data for the 3<sup>rd</sup> quarter of 2016, it is estimated that MEO's market share, excluding copper-based customers, is around only 31% in NC Areas (not taking fixed LTE into consideration<sup>76</sup>) - *vide* Table A1 of the Statistical Appendix.

In the third place, alternative operators have achieved market share in NC Areas, either by deploying their own NGA network, or by using other options - such as LTE at a fixed location - in areas where they have not deployed fixed NGA networks yet. As such, they have been able to build a customer database - notwithstanding MEO's copper-based customers - which is likely to mitigate the impact of any investment on the part of MEO, on NGA networks, in NC Areas, as well as of the possible migration of copper-based customers to MEO's fibre network (which is likely to occur only in the long term). However, even if MEO decided to switch-off its copper network (which will not occur in the period until the next market analysis, as MEO is required to notify its intention to shut down a local exchange to co-located operators at least

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<sup>75</sup> Especially in predominantly rural parishes of NC Areas.

<sup>76</sup> If accesses based on this technology were taken into account, MEO's market share in NC Areas would only reach 19% - *vide* Table A1 of the Statistical Appendix.

five years ahead<sup>77</sup>, in some cases, and MEO itself has denied this possibility in this time frame<sup>78</sup>), this does not mean that MEO would necessarily deploy a fibre network throughout the national territory. It could even, in particular if constrained by a fibre access obligation, serve certain areas with wireless technologies (such as LTE at a fixed location) - as was the case in the beginning of the year), in addition to the DTH technology with which it is already provided, thus being able to address areas not covered with fixed networks through triple play offers (based on LTE at a fixed location and DTH). As such, the fibre connectivity objective could somewhat be compromised in the long term with the imposition of an obligation for access to MEO's fibre network.

In the fourth place, it is more likely that MEO, in the period until the next market analysis, deploys the fibre optic network in a larger scale, in predominantly and averagely urban areas of NC Areas, where coverage of alternative operators has, respectively, exceeded 50% and 30%<sup>79</sup> and where MEO still has an important number of parishes to cover.

Retail market dynamics, in predominantly urban NC Areas<sup>80</sup>, have already led to a decrease in MEO's market share by four percentage points in a period of nine months (between the end of 2015 and the 3<sup>rd</sup> quarter of 2016), the referred operator having reached a market share by around 66% by the end of this period<sup>81</sup>. It is likely that, if this evolution remains, obligations already imposed and those intended to be reinforced, will create, even in the short term, an effective competition in downstream markets in these areas. As such, in averagely urban areas, it is possible that this situation will also take place in the medium term.

In predominantly rural areas, where MEO's market share decreased by more than 10 percentage points in two years, the imposition of a measure for access to fibre (a still non-existent network, save for some exceptions) is not appropriate, and could even affect the incentive to investment, ultimately to the detriment of final users who could be deprived of access to any NGA network.

This risk seems to exceed, in these areas, the risk of any re-monopolisation by MEO, in the transition to NGA networks and in the short term of the market analysis. In fact, in many of

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<sup>77</sup> Vide point 5.232 of the market analysis and respective footnote, which refers that the position taken in the determination on amendments to RUO, of 17.02.2010, is maintained. According to this determination: "*In the case of relocation of loops for reasons attributable to PTC, and for the AP where there are co-located operators, PTC shall give minimum prior notice of:*

- *12 months where the number of active loops to be relocated is less than 1/3 of the total active loops in the MDF;*
- *36 months where the number of active loops to be relocated is more than 1/3 and less than 2/3 of the total number of active loops in this AP;*
- *60 months where the number of active loops to be relocated exceeds 2/3 of the total number of active loops in this AP (including in the event that the AP itself is decommissioned, and being reduced to 36 months, if an equivalent access can be guaranteed". AP is equivalent, in this context, to MDF/local exchange".*

<sup>78</sup> In a recent communication to ANACOM, MEO stresses that "the copper network will be phased out in the long term (starting surely after 2022)".

<sup>79</sup> Vide Table A5 of the Statistical Appendix.

<sup>80</sup> With the exception, in these areas, of parishes with open NGA networks.

<sup>81</sup> In case LTE accesses at a fixed location were included, MEO's market share would decrease by 6 percentage points, to reach 56% in predominantly urban NC Areas.

these areas, the possibility of no investment on the part of any operator, and NGA deployment depending solely on public funding, should be considered. As such, in these cases, the most appropriate intervention should not involve a fibre access obligation but possibly public funding associated to an open network.

The Commission refers that the imposition of an access remedy on an existing infrastructure appears to be justified in at least a part of the wholesale local access market which corresponds to predominantly rural NC Areas (identified at retail level) in view of the need to safeguard competition, in particular where MEO intends to deploy at a larger scale and eventually replace the existing copper infrastructure; however, as MEO's fibre infrastructure is practically non-existent (in particular when compared to that of alternative operators) - a situation which tends to continue in the short and medium term - in particular in these predominantly rural areas, it may be concluded that the measure proposed is not appropriate.

## **2.9. Economic replicability test**

The European Commission refers<sup>82</sup> that ANACOM claimed that the imposition of a (tailored) access obligation would constitute an unjustified burden on MEO, given that it would imply considerable costs that could dissuade MEO from investing in those areas, also in view of the requirements on non-discrimination (EoI) and economic replicability of retail offers mandated by the Commission Recommendation on Non-discrimination and Costing<sup>83</sup>.

The Commission further refers that, according to ANACOM, applying an economic replicability test to a fibre offer in NC Areas could lead to a wholesale price below costs and that a "market penetration strategy" pricing by alternative operators might lead MEO to incur losses as it would have to lower not only its retail prices - to compete -, but also the wholesale rates - in order to ensure economic replicability -, possibly having to apply wholesale prices below costs.

As ANACOM had referred to the Commission, the imposition of a fibre access obligation that ensured economic replicability in NC Areas, would involve imposing on MEO a wholesale price for network access that would be necessarily below the unit cost of providing the service in those areas.

In fact, bearing in mind that:

- (a) The fibre optic installation cost per household is lower in densely populated C Areas and increases in other areas, on account of the level of population density and other factors, as explained in point 2.4, reaching the highest level in predominantly rural parishes of NC Areas;
- (b) The same trend may be observed with operating costs, given the greater distances operational teams must travel in these areas to perform preventive and repair activities;
- (c) The retail price charged by MEO stands expectably above the unit investment and operating cost in C Areas, and as it is uniform, and given that the unit cost increases,

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<sup>82</sup> In §76 of the Recommendation.

<sup>83</sup> Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:251:0013:0032:EN:PDF>.

as set out in the preceding point, it stands below cost in NC Areas, although in the national average, the price exceeds the referred cost,

regulating NC Areas and imposing economic replicability on MEO, in these areas, would result in the definition of a wholesale price below the (uniform) retail price, far below the service provision cost in those areas.

In this situation, not only could MEO incur losses in these areas (this would be inevitable with retail below-cost prices in these areas), but costs of beneficiaries of the fibre access obligation would decrease compared to those they would incur if they invested in NGA networks in those areas. On the other hand, and as the beneficiary operator will have a lower average cost than the average cost of the operator providing access, the latter would subsidize the former.

As a uniform tariff could be reached at national level if, for example, beneficiary operators maintained an aggressive “market penetration” strategy, MEO could be forced to reduce the wholesale price regardless of its costs in order to ensure economic replicability in NC Areas. In this context, the access price would not allow the access-providing operator to earn any remuneration of its investment.

To solve this problem, MEO would most likely break the uniform tariff practise, and increase prices in NC Areas to the level of the respective costs, to the detriment of the population in these areas, that would be charged higher prices, instead of (uniform) prices charged in C Areas, fostering aggravated info-exclusion situations.

The Commission suggests that access prices are regulated on the basis of a multi-period analysis<sup>84</sup>, with the purpose of analysing operator margin over a sufficiently extended period of time to take into account initial investment and any penetration price strategies on the part of operators benefiting from access.

In the framework of the retail pricing policy in force in Portugal, and in a dynamic context of price changes, the approach suggested by the Commission involves a series of assumptions regarding the market evolution over the next few years, which would be the reason for pricing standards that would certainly be a source of significant uncertainty, likely to negatively affect investment planned to be made in the absence of regulation. On the other hand, even in circumstances of low uncertainty, this approach does not seem to be able to remove all possible dissuasive effects on the SMP operator as regards investing in NGA networks that could be created by the imposition of an obligation for access. For example, the appropriate remuneration of the option as to the moment and conditions for entry which this obligation provides to operators benefiting from access.

As such, in view of the constrains that stem from the economic replicability test, bearing in mind the specific situation of the Portuguese market, ANACOM considers that it could create undesirable effects in the market.

## **2.10. Market for wholesale central access**

Lastly, the European Commission remains of the view<sup>85</sup>, as far as the market for wholesale central access is concerned, that NRAs should consider removing the obligation of wholesale

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<sup>84</sup> *Vide* §77 of the Recommendation.

<sup>85</sup> *Vide* §80 of the Recommendation.

bitstream access over fibre in the area concerned only where there is effective local access to the SMP operator's fibre network and such access is already likely to result in effective competition on the downstream level, or where competition is otherwise likely to become effective at the downstream level (for example, on the basis of offers based on other infrastructures). However, still according to the Commission, ANACOM fails to impose the obligation of wholesale bitstream access over fibre in the identified non-competitive market (which corresponds to the NC areas identified at retail level), even in a situation where no appropriate wholesale local access to the SMP operator's fibre network is commercially provided or imposed and prospects of infrastructure-based competition in at least parts of the NC areas at retail level are weak.

Arguments set out by ANACOM on the lack of proportionality of imposing an access obligation on MEO's fibre network, even in NC Areas, identified in the draft measure notified to the European Commission, in Phase II investigation, as well as in this document, are both valid for the market for wholesale local access provided at a fixed location and for the market for wholesale central access provided at a fixed location for mass-market products.

### **3. CONCLUSION**

The Commission concludes, in the light of the evidence currently available and of the assessments put forward in the notification itself, that ANACOM's notified draft measures concerning the ability of alternative operators to obtain local and central access provided at a fixed location in Portugal in its current form are not appropriate, in particular in light of the policy objectives and regulatory principles enshrined in article 8, paragraph 4, and article 12, paragraphs 1 and 2 of the Access Directive, in conjunction with article 8 and article 16, paragraph 4, of the Framework Directive, objectives and principles which have been transposed into the national legal system<sup>86</sup>.

ANACOM takes the view that data and reasoning presented throughout the process, namely in this document, highlight the specificities of the national broadband market compared to other European markets. In order to give effect to regulatory principles enshrined in article 8, paragraph 4, and article 12, paragraphs 1 and 2 of the Access Directive, in conjunction with article 8 and article 16, paragraph 4, of the Framework Directive, as transposed into the national legal system, as well as to obligations which fall on ANACOM in this scope, namely to ensure respect for the principle of proportionality, ANACOM cannot accept the Commission Recommendation and impose obligations for access to MEO's fibre optic network, either in NC Areas in general or in predominantly rural parishes of NC Areas.

### **4. DETERMINATION**

As such, for the reasons given above, ANACOM's Management Board, in pursuing regulatory objectives and principles, especially those provided for in paragraphs 1 a) and c) and 5 c) and d), both of article 5 of ECL, bearing in mind paragraph 4 a), c) and d) of article 72 of ECL and under articles 56 and 57-A of the same law, hereby determines as follows:

1. To approve as a final decision the determination notified to the European Commission on 01.07.2016, with the amendments that result from this document and from the report of

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<sup>86</sup> *Vide* in particular article 66, paragraph 2, article 72, paragraphs 1, 2 and 4, articles 5 and 58, paragraph 4, of ECL.

the general consultation procedure and prior hearing of stakeholders, which is an integral part hereof, and which also includes the additional reasoning and references to facts and procedural developments occurred in the meantime.

- 2.** Not to accept the Commission Recommendation, on the grounds set out in the reasoned justification which is an integral part of this determination.
- 3.** To notify the European Commission, under the terms and for the purpose of paragraph 1 of article 57 of ECL and under paragraphs 4 and 5 of article 57-A of the same statutory instrument.

## STATISTICAL APPENDIX

**Table A1. Evolution of MEO's market share (MS) in C Areas and in NC Areas**

Areas	III 2014	2015	III 2016
C (without LTE)	40%	36%	34%
C (with LTE)	39%	35%	33%
NC (without LTE)	85%	84%	80%
NGA	n.d.	n.d.	31%
NC (with LTE)	78%	72%	67%
NGA	n.d.	n.d.	19%

Source: ANACOM on the basis of operator data.

**Table A2. Parishes included in NC Areas without at least 15% NGA coverage in the 3<sup>rd</sup> quarter of 2014, and which in the 3<sup>rd</sup> quarter of 2016 were covered by an alternative operator**

	MS III 2014		MS III 2016		Δ customers III 2016 / III 2014	
	MEO	Altnets	MEO	Altnets	MEO	Altnets
Without LTE	92%	8%	72%	28%	-7%	315%
With LTE	84%	16%	60%	40%	-7%	214%

	III 2014		2015		III 2016	
	MEO	Altnets	MEO	Altnets	MEO	Altnets
Coverage	1%	2%	1%	27%	18%	70%

Source: ANACOM on the basis of operator data.

**Table A3. Evolution of the broadband penetration rate in NC Areas**

	III 2014	2015	III 2016
Without LTE	28%	29%	31%
With LTE	30%	34%	37%

Source: ANACOM on the basis of operator data and INE data.

Note: the penetration rate was calculated on the basis of the number of households registered in the 2011 Census.

**Table A4. Evolution of MEO's and alternative operators' NGA coverage in NC Areas (includes double cabling by alternative operators)**

Areas	III 2014		2015		III 2016	
	MEO	Altnets	MEO	Altnets	MEO	Altnets
NC	3%	31%	3%	33%	10%	39%
PUA	7%	53%	7%	56%	22%	69%
AUA	1%	28%	1%	30%	6%	36%
PRA	0%	15%	1%	16%	2%	16%
Open rural NGA	0%	75%	0%	75%	1%	75%

Source: ANACOM on the basis of operator data.

Note: Coverage by alternative operators includes double cabling. PUA, AUA and PRA areas include parishes covered by open rural NGA networks.

**Table A5. Evolution of MEO's and alternative operators' NGA coverage in NC Areas (excludes double cabling on the part of alternative operators)**

Areas	III 2014		2015		III 2016	
	MEO	Altnets	MEO	Altnets	MEO	Altnets
NC	3%	29%	3%	31%	10%	34%
PUA	7%	47%	7%	50%	22%	56%
AUA	1%	28%	1%	30%	6%	33%
PRA	0%	15%	1%	15%	2%	16%
Open rural NGA	0%	73%	0%	73%	1%	73%

Source: ANACOM on the basis of operator data.

Note: Coverage by alternative operators includes double cabling. PUA, AUA and PRA areas include parishes covered by open rural NGA networks.

**Table A6. Division of new NGA-covered households between C Areas and NC Areas**

Areas	2015 / III 2014		III 2016 / 2015		III 2016 / III 2014	
	MEO	Altnets	MEO	Altnets	MEO	Altnets
C	90%	91%	69%	61%	72%	77%
NC	10%	9%	31%	39%	28%	23%

Source: ANACOM on the basis of operator data.

**Table A7. New broadband customers and change in MEO's MS in NC Areas**

	<b>Marginal MS 2015 / III 2014</b>		<b>Marginal MS III 2016 / 2015</b>		<b>Marginal MS III 2016 / III 2014</b>		<b>Δ MS III 2016 / III 2014</b>
	<b>MEO</b>	<b>Altnets</b>	<b>MEO</b>	<b>Altnets</b>	<b>MEO</b>	<b>Altnets</b>	<b>MEO</b>
Without LTE	61%	39%	-3%	103%	32%	68%	- 5 p.p.
With LTE	25%	75%	-2%	102%	15%	85%	- 11 p.p.

Source: ANACOM on the basis of operator data.

**Table A8. New broadband customers and change in MEO's MS in predominantly rural parishes of NC Areas**

	<b>Marginal MS 2015 / III 2014</b>		<b>Marginal MS III 2016 / 2015</b>		<b>Marginal MS III 2016 / III 2014</b>		<b>Δ MS III 2016 / III 2014</b>
	<b>MEO</b>	<b>Altnets</b>	<b>MEO</b>	<b>Altnets</b>	<b>MEO</b>	<b>Altnets</b>	<b>MEO</b>
Without LTE	75%	25%	69%	31%	74%	26%	- 3 p.p.
With LTE	37%	63%	24%	76%	33%	67%	- 11 p.p.

Source: ANACOM on the basis of operator data. Excludes parishes covered by open NGA networks.