

# DECISION

## Application for administrative dispute-settlement intervention

### Penalties for incorrect responses to viability requests in the context of the Reference Duct Access Offer

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## 1. Vodafone's application

Vodafone Portugal – Comunicações Pessoais, S.A. (Vodafone or Applicant), by communication dated 05.06.2017, applied for ANACOM's intervention, under the procedure for administrative dispute settlement provided for in article 10 of the Electronic Communications Law<sup>1</sup> (ECL) for alleged misconduct on the part of MEO – Serviços de Comunicações e Multimédia, S.A. (MEO or Party complained against), in the scope of procedures provided for and governed by the Reference Duct Access Offer (RDAO or Offer)<sup>2</sup>, namely the obligation to pay penalties for incorrect responses to viability analysis requests.

In brief, the Applicant reports that MEO has failed to comply with its obligations to pay penalties for incorrect responses to viability analysis requests submitted by Vodafone, based, in its opinion, on an abusive interpretation of conditions set out in RDAO.

Vodafone alleges that, under section 4.2 of RDAO, as Beneficiary, it is entitled to make requests for viability analysis according to the procedure detailed in Annex 3 of the Offer. Having these requests been lodged, MEO is required to analyse each one, on the basis of information available, so that it is able to send its response to the Beneficiary, which must include, *“where partially or fully viable, the Detailed Overall Plan, that is, the response to the request for Viability Analysis according to Annex 3, including, in particular, the blueprints identifying the requested layout and the indication of pipes, whenever possible, to be occupied by the Beneficiary's cables”* (vide, also, points 2 and 8 of section 4.5.1 of Annex 3 to the Offer).

In its report, the Applicant stresses that *“for the submission of viability analysis requests”*, the Beneficiary is required to pay the amounts provided for in section 8.2 of RDAO. Specifically, as regards the request for viability analysis of occupation of the cable tunnel and the analysis of how the Beneficiary's cable may be routed internally up to MEO's exchange, an amount of €69 is due.

In its application for intervention, Vodafone also draws attention to the fact that *“RDAO sets out that in case the levels of service are not complied with for reasons directly attributable to MEO, penalties better described in Section 7 of the main document of the Offer are due”*. And *“as regards specifically the Viability Analysis Service now under consideration, a penalty of € 200.00 for each incorrect response to a viability request is provided for (Section 7 of the main document of RDAO)”*.

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<sup>1</sup> Law No. 5/2004, of 10 February; also, section 10.3 of RDAO, on *“Dispute settlement”*.

<sup>2</sup> Available at: <http://ptwholesale.pt/pt/servicos-nacionais/infraestruturas/Paginas/orac.aspx>.

According to Vodafone, it is clear from conditions provided for in RDAO that: “(i) the Beneficiary is entitled, in the scope of RDAO, to make requests for viability analysis concerning the existence of conditions for occupation of space in ducts and associated infrastructure, paying the amounts set out in Section 8.2 of the main document of DRAO, (ii) MEO is required to analyse and respond to these requests within at the most 10 calendar days, (iii) in case an incorrect response to a request for viability analysis is detected, the Beneficiary must submit to MEO a formal communication for the purpose of the application of penalties, and (iv) where it provides an incorrect response to a request for viability analysis, MEO is required to pay the Beneficiary a penalty amount of € 200.00”.

However, the Beneficiary claims that “MEO has compensated Vodafone with that amount of €200.00 by reference to each communication/claim, not by reference to each request for viability analysis, the response to which was incorrect”. It further alleges that MEO “does not even return amounts paid by Vodafone when the request is lodged”.

Moreover, Vodafone refers that “in MEO’s perspective, the communication of incorrect responses concerning several requests for viability analysis leads to the application of a single penalty, **although several requests and several incorrect corresponding responses, all or many, are involved**”.

In this respect, in order to provide a better framework for situations concerned, Vodafone presented in its application for intervention, “merely as an example”, the following calculation formula: “€ 5.799.00 [10 \*(72.80 € + 46.20 € \* 11)”.

Vodafone concludes that MEO’s arguments constitute a real abuse of rights and are contrary to the general principles of law, as well as to principles and rules that apply to the electronic communications sector and to RDAO itself.

In the light of the above, Vodafone applies to this Authority that it orders MEO to fully abide by the provisions of RDAO in this scope, specifically that it compensates “**Beneficiaries with the payment of a penalty amount of €200.00 by reference to each request for viability analysis validly lodged**”.

It is noted that, in annex to Vodafone application for intervention, there are several email communications exchanged between the two companies, between 26.02.2015 and 06.06.2016, identified with the subject “RDAO - compensation 2S 2014”.

## 2. Procedure analysis

### 2.1. Application for administrative dispute settlement

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

The dispute at stake concerns a different understanding/interpretation made by parties (MEO and Vodafone) as regards the conditions set out in a regulated Reference Offer - in this case, RDAO -, involving the payment of penalties for incorrect responses to requests for viability from Beneficiaries.

The obligation to publish the RDAO currently stems from the imposition of obligations on MEO, as company with significant market power in Market 3a, under articles 66 to 69 of ECL, which is a specific condition under article 28, point a), of the same law.

As such, on the basis of elements presented by MEO, ANACOM is found to be competent to settle the dispute under consideration.

On its turn, paragraph 2 of article 10 of ECL lays down that ANACOM's intervention must “*be requested within a period of one year at the most from the date on which the dispute commenced*” (emphasis added).

Vodafone's application for intervention attaches several emails exchanged between the parties on the subject “*RDAO - compensation 2S 2014*”, and, in the message dated 10.02.2016, the Applicant explicitly refers as follows: “*A difference of interpretation as regards compensation for incorrect response persists. In this regard, we request your reassessment, as the Offer is quite clear, penalties are due according to request and not according to occurrence, as MEO argues*”.

On 21.03.2016, MEO replied that “*the claim is restated for different viability requests (a single claim) thus a single compensation must be considered*”. And it is through MEO's communication of 06.06.2016 (an email which Vodafone also attaches to its application), where MEO makes it clear that the company “*Reconfirm(s) its point of view*”, that the existence of a dispute is confirmed, on penalties for mistakes in responses given in the context of the viability analysis service in the scope of RDAO.

As such, as regards the maximum time limit of one year from the date on which the dispute started to apply for ANACOM's intervention, it was found that Vodafone's application was submitted to this Regulatory Authority on 05.06.2017, the last email between MEO and Vodafone on the subject under consideration having been exchanged on 06.06.2016 (date on which it is confirmed that it was not possible to achieve a friendly solution to the dispute).

There are certainly several emails between the companies that date back to 2015 on the subject under dispute (the first one dates 26.02.2015), so it could be argued that the dispute *started* before the date of the last email attached to the application of 06.06.2016.

Notwithstanding the fact that the beginning of the dispute may have taken place over a year ago, ANACOM took the view that the administrative procedure for the purpose of the administrative dispute settlement should continue, and chose not use the prerogative to which the Authority is entitled under point b) of paragraph 1 of article 11 of ECL<sup>3</sup>.

## **2.2. Request for information and clarifications**

In the scope of the preliminary analysis to the application submitted, it was found, from the content of the several emails attached to the application, that it was not totally clear what type of situation was concerned, nor which interpretation each party made of it.

Specifically, from MEO's email of 21.03.2016 (attached to the application for intervention), it is difficult to understand whether different viability analysis requests are concerned, or whether a single request has been repeatedly lodged by Vodafone.

On the other hand, as regards the calculation formula presented by Vodafone concerning the minimum amount due for the viability analysis request, it was found that the price per manhole (MH) appears multiplied by "11", not by "1", as one would have expected, as Vodafone refers that in this exercise it took into account requests with a single MH.

As such, bearing in mind the existence of the referred doubts:

**a) MEO** was sent a letter on 19.03.2018<sup>4</sup>, through which the Party complained against was made aware of the application for intervention at hand, and additional clarifications and information were required on the contended matter, under paragraph 1 of article 108 of ECL.

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<sup>3</sup> ANACOM *is entitled* to reject the application made by Vodafone, for expiry of the right to apply for intervention, under point b) of paragraph 1 of article 11 of ECL.

<sup>4</sup> With reference ANACOM-S006555/2018.

As such, (i) clarifications were required on whether different viability analysis requests, to which emails that support the request for intervention refer, are concerned, or whether a single request, which Vodafone lodged repeatedly, is at stake, and (ii) MEO was enquired as to the grounds for declaring that, in this specific case, a single penalty is due.

MEO replied, within the deadline set for the purpose, on 11.04.2018<sup>5</sup>.

**b) Vodafone** was sent a letter also dated 19.03.2018<sup>6</sup>, and enquired whether different viability analysis requests were concerned, or whether a single request, repeatedly lodged, was at stake. The company was also asked to clearly identify the request(s), date(s) on which it (they) was (were) made and section(s) concerned.

As regards the illustrative example that was presented, the Applicant was asked what the parameter mentioned as to the formula for calculation of the minimum amount to be paid, presenting the value “11”, specifically refers to.

Having Vodafone been duly notified, and in the absence of a response within the deadline set for required clarifications, but given that the latter were relevant to pursue the ongoing analysis, a new letter<sup>7</sup> was sent to the Applicant, in order to obtain a response to the request for clarifications.

Vodafone responded via fax on 22.05.2018.

### **2.2.1. MEO’s position and clarifications**

MEO provided the requested information, and expressed its position on the dispute under consideration. As such, the company informed that the viability analysis requests at stake are different, notwithstanding the fact that “*sections that were the subject of an incorrect “response” are common to the referred requests*”.

In this respect, it further informed that a total of 9 requests were identified in the context of the determination of penalties concerning the 2<sup>nd</sup> half of 2014 as well as the 1<sup>st</sup> half of 2015, presented in the table below, with the information deemed to be relevant:

## **[Beginning of Confidential Information - BCI]**

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<sup>5</sup> Through letter with reference S0095.

<sup>6</sup> With reference ANACOM-S006556/2018.

<sup>7</sup> With reference ANACOM-S010181/2018.

Blocks	Ref. viability analysis request	Date of MEO's response	Duct section	Date of confirmation of works	Date of claim by Vodafone
1 <sup>st</sup>	OCS00177139	12.09.2014		07.10.2014	13.10.2014
	OCS00181627	23.09.2014		17.10.2014	
	OCS00186700	13.10.2014		23.10.2014	
2 <sup>nd</sup>	OCS00181750	26.09.2014		28.10.2014	10.12.2014
	OCS00193342	04.11.2014		24.11.2014	
	OCS00196865	18.11.2014		02.12.2014	
	OCS00196867	17.11.2014		01.12.2014	
3 <sup>rd</sup>	OCS00157093	13.06.2014		03.07.2014	29.07.2014
	OCS00157106	19.06.2014		03.07.2014	29.07.2014

**[End of Confidential Information - ECI]**

In its statement, MEO separated requests in a 1<sup>st</sup> and 2<sup>nd</sup> block, one with 3 requests and another with four requests, respectively, with a common claim for all requests of each block. In these cases, the company declares that the claim for each section was addressed to MEO, simultaneously, for all requests of each block.

In addition, MEO referred a 3<sup>rd</sup> block, with 2 requests, of a different nature from cases with common infrastructures. According to MEO, these requests were included in this range due to the fact that they were considered, by mistake, as requests with a common infrastructure.

In the case of the request identified with reference OCS00157093, MEO declared that it rejected the claim of “incorrect response” as to the viability of space for installation of a Connection Point (CP), after having found that the referred CP had been installed on its infrastructures.

As regards the request with reference OCS00157106, on the contrary, MEO declared that it accepted the compensation claimed by Vodafone for incorrect response as to the viability of space in a MH for installation of a CP.

Moreover, MEO clarified that in the cases regarding the 1<sup>st</sup> and 2<sup>nd</sup> blocks, there was a single claim against the section concerned, which aggregated the different requests for viability where the section was being considered, thus it believes that a single penalty should be considered.

The company further refers that requests for viability were lodged by Vodafone in a consecutive manner, and MEO was not given the chance to analyse and comment on the first “incorrect response”. In these situations, the Party complained against takes the view that the value of the compensation should be determined according to occurrence and not according to lodged request.

Still on this subject, MEO mentioned that *“the principle set out in RDAO is that the value of compensation to be determined must consider a penalty per request (...) must be applied in so far as it is guaranteed that, following a claim, it is safeguarded that Altice is given the chance, within good enough time, to analyse, respond and, where appropriate, to correct the information which forms the basis of the “incorrect response” to the viability request”*.

MEO also assessed the illustrative case presented in Vodafone’s request for intervention, which in its perspective *“is far removed from reality, given that, in principle and logic, no Operator would ever place 10 viability analysis requests identifying “repeated” alternative layouts for the same MH”*. According to the Party complained against, a *“much more realistic example would include 2 or 3 viability analysis requests, each one with at least a common duct section and respective associated MH”*.

### 2.2.2. Vodafone’s clarifications

In the scope of its clarifications, Vodafone confirmed that *“several different requests”* are at stake *“for a same area where MEO’s Extranet records were not correct. Even so, that company billed for each of them an (incorrect) viability analysis”*.

Vodafone presented the following table with a list of requests concerned, which is set out below for all due effects: **[BCI]**

GECA	Amount paid by Vodafone
OCS00157106	
OCS00157093	
OCS00193342	
OCS00196865	
OCS00196867	
OCS00186700	
OCS00181627	
OCS00193342	
OCS00196865	
OCS00196867	
OC500181627	
OCS00186700	
<b>TOTAL</b>	

**[ECI]**

Immediately afterwards, Vodafone clarified the different positions of both parties to the dispute.

As regards “**Vodafone’s position**”, the Applicant declared that it paid for each of these requests for viability analysis (the amount of which are indicated on the table) and found out later that MEO’s response had been incorrect. As such, it believes that, under the Offer, it is entitled to a compensation of €200.00 per request incorrectly responded to.

On the other hand, the company presented what in its perspective “**MEO’s position**” is in the dispute: “*Vodafone lodged viability requests that were incorrectly responded to on the basis of the same record error. MEO takes the view that, for this fact, only the first request incorrectly responded to is to be compensated for 200€, as it alleges that there was not enough time to correct that same record error on account of the series of requests that Vodafone had lodged. It is stressed, however, that to this position Vodafone replied that, in this case, MEO should have rejected the subsequent requests, and, consequently, it should not have billed them*”.

The Applicant stated also that MEO should opt between compensating Vodafone for €200.00 for each request incorrectly responded to or, if this is not thought advisable, returning Vodafone the amounts billed for each request considered to be subsequent.

As regards the illustrative exercise presented in its application for intervention, Vodafone confirmed that the calculation formula that it had used was mistaken, mentioning that the correct version is based on Annex 8 to RDAO that provides for “*Billing Provisions*”, a new example being provided:

- Where the request is viable = € 72.80 + € 46.10 = € 118.90;
- Where the request is partially or fully unviable = € 72.80 + € 46.10 \* 11 = € 579.90

### **3. Prior hearing of stakeholders**

By determination of 30.08.2018, ANACOM’s Management Board approved the draft decision (DD) on the “*Application for administrative dispute-settlement intervention - Penalties for incorrect responses to viability requests in the context of the Reference Duct Access Offer*”.

This draft decision was submitted to the prior hearing of stakeholders under the terms and for the purposes of articles 121 and 122 of the Administrative Procedure Code (APC). Parties were duly notified<sup>8</sup> through registered letters<sup>9</sup> sent with acknowledgement of receipt, on 30.08.2018, a 10-working day time limit having been set for comments.

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<sup>8</sup> According to postmarked acknowledgments of receipt signed (by each) on 03.09.2018.

<sup>9</sup> With reference ANACOM-S0014783/2018 and reference ANACOM-S014785/2018.

Vodafone and MEO submitted their positions to the draft decision on 17.09.2018, the right to the prior hearing of each of the stakeholders being considered to having been duly exercised, in the scope of this application for administrative dispute-settlement intervention, pursuant to and for the purpose of APC.

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

#### **4. Framework within RDAO (version 5.2)**

The dispute at stake is now analysed from a substantive point of view, in the light of rules in force in the RDAO, version 5.2., dated 30.06.2015<sup>10</sup>, thus a summary of main provisions which are of relevance to the final outcome of this dispute is now presented.

According to section 4.2 of DRAO, *“The viability analysis service assesses the existence of conditions for occupation of space in ducts and associated infrastructure, in accordance with Annex 2, upon a request from the Beneficiary for the installation of cables and equipment.*

*This service applies to all requests the associated blueprints of which concern areas with or without duct occupation information service, regardless of whether in the respective request only sections with available duct occupation information are requested, as well as to viability analysis requests for access to MH without duct sections associated to adjacent MH.*

The same section of the Offer provides also that *“Viability analysis requests must be submitted according to procedures provided for in Annex 3, including the information provided for therein, in particular the blueprints with the requested layout. In addition, in order to facilitate the processing of the viability request, an overall blueprint of the project may be also attached.”*

Moreover, *“Each viability analysis request shall consist of no more than 20 Duct Sections”*.

Still under the terms of the same section, *“MEO is required to analyse each request on the basis of available information, which may involve local acknowledgement of the availability of*

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<sup>10</sup> By decision of 29.06.2017, ANACOM approved interim and urgent measures concerning suspension of the entry into force of amendments to RDAO (and RPAO) introduced by MEO on 16.05.2017 and 30.05.2017, suspension measures which took effect as from 06.07.2017 (inclusive). The time limit up to 13.08.2018 (which has been already extended) of the Consultation on amendments to RDAO and RPAO, the draft decision of which was approved at the meeting of the Management Board of 25.05.2018, is currently running.

space in ducts and associated infrastructure concerned, in order to check the possibility for occupation by cables and equipment referred to in the request”.

It follows: “The response to the viability analysis request shall be submitted to the Beneficiary, which shall include, in case it is partially or fully viable, the Detailed Overall Plan, that is, the response to the viability analysis in accordance with the provisions set out in Annex 3, including, in particular, the blueprints identifying the requested layout and the indication of pipes, whenever possible, to be occupied by the Beneficiary’s cables”.

As regards prices associated to the viability analysis service, they have been defined in section 8.2, which establishes as follows:

Viability Analysis	Without identification of alternative layout	With identification of alternative layout
Basic price (per request)	63.30 €	72.80 €
Price per MH	46.10 €	

The reference that “For the viability analysis of occupation of the cable tunnel and the analysis of how the Beneficiary’s cable may be routed internally up to MEO’s exchange, an amount of 69.00 € is due per viability analysis request” is added to the table.

As far as penalties are concerned, section 7 of RDAO explicitly provides for the payment of a penalty amounting to € 200.00 per incorrect response from MEO to the request for viability analysis submitted by the Offer Beneficiary. The table presented in page 27 of the offer explicitly sets out in detail:

Parameter	Penalty per Request	Limit
(...)	(...)	(...)
Incorrect response to request for Viability/Extranet/Installation (Note 2)	200 €	-

Note 2 to the table provides as follows: “This penalty applies in situations where MEO’s response to a viability analysis request is incorrect or where, as a result of the duct occupation information service, an incorrect response follows, the liability for which is attributable exclusively to MEO. Cumulatively, MEO is required to indicate a viable alternative layout for the same terminal points, at no additional cost to the Beneficiary, by the deadlines set out in RDAO. The application of this penalty assumes that the Beneficiary will send a formal communication to MEO as soon as this occurrence is detected, by the end of the validity of

*the respective request, through an email sent to the respective Commercial Management*" (cfr. page 28 of the Offer).

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

## **5. Dispute analysis**

### **5.1. Prior delimitation**

In its application for intervention, the Applicant failed to identify specifically the requests for viability analysis under consideration, however, in the annex thereto, it took care to ensure that an exchange of emails with MEO was included on the subject identified as "*RDAO - compensation 2S 2014*".

Having these emails been analysed, it was found that they evidence a lack of consensus between Vodafone and MEO on the interpretation of the conditions of the Offer as far as compensation is concerned (i.e., penalties) for incorrect responses to requests for viability analysis that took place during the period that corresponds to the 2<sup>nd</sup> half of 2014.

However, in the email of 22.01.2016 sent by MEO to Vodafone (which is attached to the application for intervention presented to ANACOM), it is observed that the company declares it expects from the Beneficiary the issue of a bill for € 2,600.00 for RDAO compensation for the 2<sup>nd</sup> half of 2014. This information seems to indicate the existence of a total of **13 requests** for viability analysis submitted during the 2<sup>nd</sup> half of 2014 (**13 x € 200.00 = € 2,600.00**) for which the respective penalties for incorrect responses from MEO to such requests were due<sup>11</sup>.

Subsequently, in the table presented by Vodafone in the scope of clarifications provided on 22.05.2018, the Applicant identifies **12 requests** for viability analysis with incorrect response from MEO, 5 of which are repeated. As such, there seem to be, at least **7 different requests** pointed out by Vodafone as to the reference period.

On its turn, MEO identified in its clarifications provided on 11.04.2018 a total of **9 different requests** for viability analysis submitted by Beneficiary in the scope of the determination of penalties for the 2<sup>nd</sup> half of 2014 (as well as the 1<sup>st</sup> half of 2015).

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<sup>11</sup> Notwithstanding the fact that there are other situations that could require payment of compensation by MEO to RDAO Beneficiaries - provided for in Section 7 of version 5.2 of the Offer.

The disparity as to the effective number of requests for viability analysis identified by the parties is evident<sup>12</sup>. However, it does not seem to be relevant for the analysis and outcome of this dispute. In fact, what matters for the analysis is the fact that there are different requests (i.e., requests that are not repeated by the Beneficiary) - an information which both parties corroborate, as explained in greater detail in the point below.

It is not up to ANACOM to decide the specific amount MEO owes Vodafone. This is a matter that the parties must settle at contractual level, according to rules applicable under the Reference Offer that govern the contracting of the access to and use of ducts.

In this sense, it must be delimited, on a preliminary basis, that the analysis of the dispute concerns exclusively an interpretative issue of conditions provided for in RDAO as regards penalties due for incorrect responses given by MEO to requests for viability analysis submitted by a Beneficiary, in this case Vodafone, with the purpose of clarifying the terms of the Offer and obligations that arise therefrom for their holder. It is under this perspective that the dispute opposing Vodafone and MEO is hereby analysed at substantive level.

## **5.2. Origin of the penalty**

It must be stressed that this penalty stems from ANACOM's determination of 28.10.2010 on amendments to RDAO, where it was ordered, in brief, that in cases where MEO gives a (positive or negative) response to a viability analysis request that proves to be incorrect, it is required to introduce in the RDAO the obligation to pay a compensation amount of € 200,00 euros to the Beneficiary (*vide* determination points D.7 and D.8 in page 14 of the referred determination<sup>13</sup>).

In fact, for transparency purposes, RDAO Beneficiaries have indicative information on the state of occupation of MEO's ducts via access to the RDAO database, and in areas where this information is not available, they may submit MEO occupation viability requests. Subsequently, each viability analysis request submitted by a RDAO Beneficiary must be responded to by MEO within at the most 10 consecutive days for 100% of situations (*vide* parameter of quality of service (PQS) 2 in page 26 of RDAO version 5.2).

It is recalled that, in the scope of the prior hearing and public consultation report on the draft decision concerning amendments to RDAO, which integrates the referred determination of

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<sup>12</sup> It is stressed also that, in its comments, Vodafone clarified that it had made 9 analysis requests for the reference period and, by mistake, 12 requests were indicated in the table presented in its clarifications provided on 22.05.2018.

<sup>13</sup> Available at <https://www.anacom.pt/render.jsp?contentId=1058577>.

ANACOM of 28.10.2010, ANACOM explicitly took the view that the compensation amount of € 200.00, to be paid for a positive response to a viability analysis request that that proves to be incorrect “is mainly intended to compensate the Beneficiary for costs with the travel expenses of staff and respective equipment to the installation site, where it is not able to carry out the works, and also for a certain delay which is placed on the performance of works (which is deemed to exist, although it is taken into account that the intended cable installation would not be possible in the original layout, given its unviability). As such, it is deemed that the 200 euro compensation per incorrect viability analysis is appropriate and represents a reasonable commitment between PTC and Beneficiaries, the suggestion put forward by Beneficiaries, of 200 euros per day of delay, being excessive” (emphasis added - cfr. page 43 of the referred Report<sup>14</sup>).

In the “case of a negative response to a viability analysis request”, it was established that “PTC must substantiate to the Beneficiary the unviability of occupation in the concerned duct section(s), and ICP-ANACOM is entitled to carry out surveillance activities, at request and where considered to be justified. In case the negative response is found to be incorrect, PTC is required to pay the Beneficiary a compensation amount of 200 euros, for damage caused, namely for preventing the Beneficiary from installing cables in ducts concerned more quickly” (emphasis added - cfr. page 45 of the Report).

### **5.3. Different requests for viability analysis**

The Party complained against in this procedure, MEO, categorically admits in its clarifications of 11.04.2018 that several - different - requests were placed by Vodafone, the responses to which were incorrect, and for which a single penalty/compensation amount was paid.

In this regard, MEO identified in its clarifications a total of 9 requests for viability analysis submitted by Vodafone in the scope of the determination of penalties concerning the 2<sup>nd</sup> half of 2014, as well as the 1<sup>st</sup> half of 2015. These requests were given, by MEO itself, different reference numbers, and were responded to by MEO also on different dates, although some of them correspond to common duct sections.

In fact, the first 3 requests, set out in the table prepared by MEO and reproduced above (aggregated in the 1<sup>st</sup> block) refer to the same duct section (i.e., **[BCI] - [ECI]**) and the four subsequent requests, indicated on the same table (aggregated in the 2<sup>nd</sup> block), refer also to the same duct section (i.e., **[BCI] - [ECI]**).

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<sup>14</sup> Available at: <https://www.anacom.pt/render.jsp?contentId=1058577>.

In this context, it must be corroborated that nothing prevents different requests for viability analysis to be submitted by a Beneficiary to RDAO (with different number assigned by MEO) that include the same duct section, given that “*a viability analysis request for occupation of PTC ducts, submitted by a RDAO Beneficiary, may include one or more duct section between manholes, up to a maximum of 20 sections per request (as determined by ICP-ANACOM in the decision on amendments to the offer dated 26.05.2006)*” - cfr. page 12 of the determination of ANACOM of 28.10.2010 on amendments to RDAO.

As such, although those requests for viability analysis include the same duct section, each request may concern the occupation of MEO ducts with different cables or equipment owned by the Beneficiary, thus they are different requests, and are treated as such, reason for which MEO assigns them different reference numbers.

In fact, and as provided for in RDAO, what is required in a request for viability analysis submitted to MEO by Beneficiaries of RDAO, is that they are able to be informed, by the Offer provider, whether (or not) there is viable space for occupation of ducts (e.g. duct section), with its cables and equipment, namely CP and cable gaps.

Each request for viability analysis of occupation of ducts submitted to MEO by a Beneficiary is identified by the latter with a single identifier (different from those assigned to other requests), and is considered to be an autonomous request which must be responded to by MEO. That is, different requests for viability analysis are identified with different reference numbers.

As such, in this case, it is deemed that the viability requests identified and submitted by Vodafone are different requests, and responses given by MEO are also different, each response corresponding to a request.

In this regard, further to each incorrect response from MEO, the payment of the corresponding penalty is due. This means that if Vodafone submitted 7 viability analysis requests, which received an incorrect response from MEO, then the payment of 7 penalties is due. Consequently, MEO's argument that supports the payment of a single penalty on account of the fact that Vodafone submitted a single claim aggregating all 7 requests for viability analysis does not stand up.

It is therefore important not to confuse the existence of a single “claim” from Vodafone for the payment of penalties by MEO, with the existence of several viability analysis requests

(different requests, let us emphasise) submitted by Vodafone to MEO, the incorrect responses from the latter result in the duty to pay Vodafone the respective penalties.

It is highlighted that under the Offer “*The application of this penalty assumes that the Beneficiary will send a formal communication to MEO as soon as this occurrence is detected, by the end of the validity of the respective request*” (emphasis added - cfr. Note 2 to page 28 of RDAO).

Moreover, under section 4.2, on Viability Analysis, it is set out that “*Where the Beneficiary detects the existence of any mistake in the response to the occupation viability analysis sent by MEO, it is entitled to challenge the contents of this response up to the expiry of the **period of validity of this response (60 days)**, or in alternative up to the expiry of the stage for Access and Installation*” (emphasis added - cfr. page 15 of the Offer).

As such, as RDAO provides for a deadline for claims against MEO’s responses to viability analysis requests, it is deemed plausible and possible that Vodafone aggregates several requests for viability analysis with an incorrect response from MEO, in a single claim, and nothing prevents it from doing so.

Consequently, there may be a single claim, covering/aggregating different requests that received incorrect responses, which must be considered as such for the purpose of the application of penalties. MEO is mistaken in considering it is supposed to pay a single penalty amounting to € 200.00, just because the Beneficiary, in this case Vodafone, submitted it a single claim, as it in fact covers several/different requests, as explained above.

As regards the last 2 requests for viability analysis presented by MEO in its clarifications, they are also deemed to be different, as they refer to requests for viability analysis for the installation of CP in different MH.

According to information from MEO, this company rejected the “incorrect response” claim for the request for viability analysis with reference OCS00157093, after having found that the CP in that request had been effectively installed by Vodafone in MEO’s infrastructures.

Although Vodafone claimed against the positive response from MEO to the request for viability analysis, as Vodafone was able to successfully install the CP in the concerned MH, it is deemed that MEO is not required to pay the corresponding penalty, as it does not seem that Vodafone suffered any damage requiring compensation.

It is restated that ANACOM determined the application of penalties for each incorrect response from MEO to each request for viability analysis submitted per RDAO Beneficiary, by determination of 28.10.2010, specifically where there is:

- a- An incorrect positive response from MEO (to the viability analysis request) - determination point D 7.<sup>15</sup> - as "*the beneficiary will have incurred costs as a result of staff travelling to the installation site with their equipment but being unable to immediately carry out the installation works*" (cfr. page 13).
- b- An incorrect negative response from MEO (to the viability analysis request) - determination point D 8. - "*for the losses incurred, especially in preventing the beneficiary from installing the cables on the routes in question more quickly*" (cfr. page 14).

On its turn, MEO referred that it accepted the penalty claimed by Vodafone for the incorrect response to the request for viability analysis with reference OCS00157106. This Regulatory Authority takes the view that, in this case too, the corresponding penalty must be paid per incorrect response from MEO, as MEO itself explicitly acknowledges.

As regards MEO's arguments that the requests for viability analysis were placed by Vodafone in a consecutive manner, without MEO having had the possibility to analyse them and assess the first "incorrect response", ANACOM considers it does not stand up.

In fact, ANACOM considers that MEO should adapt its resources, in order to handle both the requests for viability analysis it is submitted, and claims for penalty payment presented by Beneficiaries.

It is deemed in this context that the payment of penalties on the part of MEO should not be made dependant on whether the company is able "*within a reasonable time*" to analyse the claim presented by the Beneficiary of the Offer. In fact, it is stressed that, as regards the payment of compensation for failure to meet PQS, RDAO itself provides for MEO's *proactivity*, not that it is required to wait for a possible claim from the Beneficiary.

In fact, under section 7 of RDAO, "*MEO shall pay on its own initiative the compensation amount for failure to comply with objectives of quality of service set out (described above) by the end of the second month after the end of the half year under consideration, without*

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<sup>15</sup> In this case, the peculiarity that MEO is required to indicate a viable alternative layout, at no additional cost to the beneficiary, has been provided for - cfr. point (a).

prejudice to a subsequent reassessment and adjustment taking into account values established by Beneficiaries” (emphasis added - cfr. page 28 of the Offer).

#### **5.4. Exercise/illustrative case**

To conclude the analysis, the illustrative case presented by Vodafone in its application for intervention must be mentioned, the mistake in which was detected and addressed in its clarifications provided on 22.05.2018.

Regardless of the explanations presented by MEO as to why the example given by Vodafone does not match reality (as to the calculation of the amount to be paid to MEO for the service of the viability analysis on the basis of prices of the table provided for in section 8.2 of RDAO, set out above), it is deemed that this is a mere example, in which Vodafone considered, for the sake of simplicity, requests for viability analysis with a single MH.

Without prejudice, Vodafone made the mistake of considering the possibility of a response indicating partial viability or full unviability (with indication of an alternative layout on the part of MEO), which does not apply for a request with a single MH, having included in the calculation the “11” multiplicative factor, when in fact it should have been “1” (which corresponds to the number of MH concerned in the example presented).

Strictly speaking, this mistake is not relevant to the case under examination, which concerns the payment by MEO of penalties for incorrect responses given to Vodafone to several requests for viability analysis that had been submitted, and, as such, MEO’s argument that the illustrative exercise given by Vodafone does not match reality is irrelevant.

#### **6. Decision**

In the light of the above, in pursuing the tasks provided for in points a), b), c), and g) of paragraph 1 of article 8 of its Statutes, approved by Decree-Law No. 39/2015, of 16 March, in the exercise of powers provided for in point b) of paragraph 2 of article 9 of the same Statutes as well as competences provided for in article 10 of ECL, the Management Board, under point q) of paragraph 1 of article 26 of the Statutes, hereby determines as follows:

1. To order MEO to pay Vodafone a penalty of € 200.00 corresponding to each incorrect response given by MEO to each request for viability analysis lodged, in conformity with section 7 of RDAO (not just the payment of a single penalty corresponding to several requests for viability analysis).

2. For the purpose of the preceding paragraph, the payment of the penalty applies for different requests for viability analysis, even if they concern the same duct section, and this is also valid for situations where a single claim was lodged by the Beneficiary aggregating different requests the responses to which were incorrect.

Lisbon, 24 October 2018.