



EUROPEAN COMMISSION

Brussels, 23.8.2019  
C(2019) 6266 final

Autoridade Nacional de Comunicações  
(ANACOM)  
Avenida José Malhoa No. 12  
1099-017 Lisboa  
Portugal

For the attention of:  
Mr. João Cadete de Matos  
Chairperson

**Subject: Commission Decision concerning Case PT/2019/2193: Wholesale market for local access provided at a fixed location in Portugal - Changes to the reference offer for duct- and pole access (ORAC and ORAP)**

**Article 7(3) of Directive 2002/21/EC: No comments**

Dear Mr Cadete de Matos,

## **1. PROCEDURE**

On 30 July 2019, the Commission registered a notification from the Portuguese national regulatory authority, the *Autoridade Nacional de Comunicações* (ANACOM)<sup>1</sup>, concerning changes to technical details of the reference offer for duct- and pole access in the wholesale market for local access provided at a fixed location<sup>2</sup> in Portugal.

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<sup>1</sup> Under Article 7 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), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

<sup>2</sup> Corresponding to 3a in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

The national consultation<sup>3</sup> ran from 4 June 2018 to 13 August 2018.

On 05 August 2019, a request for information<sup>4</sup> was sent to ANACOM and a response was received on 7 August.

## **2. DESCRIPTION OF THE DRAFT MEASURE**

### **2.1. Background**

The last review of the market for wholesale local access provided at a fixed location in Portugal was notified to and assessed by the Commission under case PT/2016/1888<sup>5</sup>. The relevant product market was defined by ANACOM as incorporating all access products irrespective of the supporting technology (i.e. copper, cable and fibre products) and including self-supply<sup>6</sup>. The relevant geographic market was considered to be national in scope<sup>7</sup>.

ANACOM designated the incumbent operator, MEO<sup>8</sup>, as having SMP in market 3a due to its high market share<sup>9</sup> and barriers to entry and expansion<sup>10</sup>. ANACOM added that, regardless of the inclusion or not of (coaxial) cable-based access in the definition of market 3a, the findings as to the existence of SMP would not change, in any case.

ANACOM concluded that even in light of the developments that have occurred with regards to the roll-out of next generation networks, it was still essential – in addition to access obligations with regard to ducts and poles<sup>11</sup> – to continue to impose on MEO

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<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>5</sup> SG-Greffe C(2015) 5095 final

<sup>6</sup> ANACOM was of the view that cable belongs to the relevant market based on direct constraints. ANACOM put forward that, even though a wholesale access offer does not exist in Portugal, a wholesale access offer on fibre (GPON) and a VULA type wholesale access offer on cable would present similar characteristics also from a technical point of view. ANACOM added that the cable network is evolving towards a FTTH network through a progressive replacement of the cable terminal segment with fibre, and refers to the national coverage of NOS. ANACOM further put forward that analysing the access on copper and fibre only would not be representative of the competitive situation at the retail level. According to ANACOM, competition at the retail level was mainly based on vertically integrated operators with their own networks using the other regulated offers in this market (access to ducts and poles).

<sup>7</sup> ANACOM refers to MEO's network having national coverage and to the regulated wholesale offer presenting uniform prices throughout the national territory.

<sup>8</sup> On December 29, 2014, PT Comunicações, S.A. (previously referred to as PTC), incorporated MEO Serviços de Comunicações e Multimédia, S.A., by way of a merger and acquired the corporate name.

<sup>9</sup> The market shares in 2015, including self-supply, were as follows: MEO 50%, NOS 33%, Vodafone 12% and Apax 5%.

<sup>10</sup> ANACOM refers to the lack of indicators which demonstrate the existence of effective competition between companies (prices and other variables) and the absence of potential competition at national level.

<sup>11</sup> Access to ducts and poles will be granted on an Equivalence of Inputs (EoI) basis. The costs of assets corresponding to ducts and poles will be based on the regulatory net book value of the accumulated depreciation, indexed by a suitable price index, taking into account an appropriate depreciation period. ANACOM also imposed subsidiary access to dark fibre, i.e. only when there is no space in ducts and poles. Access to dark fibre will be granted on an EoO basis. The cost oriented price of access to dark fibre will be determined by MEO based on its own relevant costs and will then be reviewed by ANACOM.

obligations to provide access to LLU<sup>12</sup> at national level. ANACOM also imposed obligations of cost-orientation, non-discrimination, cost accounting, accounting separation, financial reporting, as well as – most relevant for the present notification – a transparency obligation, which included the obligation to provide a regulatory reference offer for the provision of unbundling services.

It is worth noting, however, that ANACOM intended to keep fibre unregulated, and did not envisage imposing on the SMP operator an obligation to provide physical or virtual fibre unbundling<sup>13</sup>.

In response to ANACOM's proposal at the time, the Commission raised serious doubts in particular in relation to the proposal not to regulate fibre access. Following an in-depth investigation during a Phase II assessment, the Commission issued a Recommendation under Article 7a of the Framework Directive, requiring ANACOM to amend or withdraw the remedies relating to the access obligations imposed on MEO in those areas of the wholesale local (and central) access markets corresponding to the non-competitive 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. The Commission asked ANACOM, in particular, to impose on MEO a wholesale obligation to provide access to the unbundled fibre line. In doing so, ANACOM should consider, in view of the Commission, 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 Methodologies and consider using MEO's commercial offer as a basis for the regulated access product.

However, the Commission did not criticise the imposition of duct and pole access nor the imposition of a requirement to provide a regulatory reference offer for the provision of duct and pole access.

## **2.2. The draft measure**

The measure contains ANACOM's proposed changes to technical details of the reference offers for duct access (ORAC) and pole access (ORAP).<sup>14</sup> With the proposed changes, ANACOM seeks to facilitate the use of these infrastructures and ultimately network rollout.

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<sup>12</sup> Access to the local loop will be granted on an Equivalence of Output (EoO) basis. As to price, if MEO fails to guarantee that the price under the reference offer will not increase, a BU LRIC+ model will be used; otherwise, the current costing system will be kept.

<sup>13</sup> ANACOM justified this twofold. First, for those areas where it considered sufficient retail competition to prevail, it argued that the existence of such retail competition was sufficient to constrain MEO's behaviour. Secondly, as to the areas with little retail competition, ANACOM argued that the non-imposition of regulated access to fibre was based on proportionality grounds given that MEO's fibre coverage in the non-competitive areas is limited to [REDACTED] and that the regulatory enforcement could constitute a disincentive to further NGA deployment. ANACOM also refers to a wholesale commercial access offer to fibre published by MEO on 11 March 2016.

<sup>14</sup> The measure sets i.a. detailed price provisions for specific services, obligations regarding repair services, repair times and notification periods for works. The measure amends provisions on service quality parameters and contains obligations to provide specific information regarding ducts and poles. Moreover the measure proposes to delete or amend specific and detailed provisions on penalties.

In its response to the Commission's RFI, ANACOM further explained that all operators (other than MEO which primarily relies on its own ducts and masts) rely on the appropriate third-party infrastructures, either of MEO or of entities outside the sector, for the hosting of their networks, both in terms of underground infrastructure and in terms of air infrastructure, irrespective of geographical location.

In the RFI, ANACOM also described how the usage of cable ducts and poles has consistently increased over the last years. With this draft notification, ANACOM expects this increase to continue.

### **3. NO COMMENTS**

The Commission has examined the notification and the additional information provided by the ANACOM and has no comments.<sup>15</sup>

Pursuant to Article 7(7) of the Framework Directive, ANACOM may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>16</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>17</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.<sup>18</sup> You should give reasons for any such request.

Yours sincerely,

For the Commission,  
Roberto Viola  
Director General

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<sup>15</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>16</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

<sup>17</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>18</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.