



EUROPEAN COMMISSION

Brussels, 15.7.2022
C(2022) 5174 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: Case PT/2022/2382: market for wholesale local access provided at a fixed location in Portugal – Review of monthly fees for regulated access to MEO’s ducts and poles

Commission Comments pursuant to Article 32(3) of Directive (EU) 2018/1972

Dear Mr Cadete de Matos,

1. PROCEDURE

On 15 June 2022, the Commission registered a notification from the Portuguese national regulatory authority (NRA), Autoridade Nacional de Comunicações (ANACOM)¹, concerning the market for wholesale local access provided at a fixed location² in Portugal.

¹ Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

² Corresponding to market 1 in the Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible

The national consultation³ ran from 16 February 2022 to 23 March 2022.⁴

The Commission sent a request for information⁵ to ANACOM on 27 June 2022 and 1 July 2022, and received a reply on 30 June 2022 and 4 July 2022, respectively.

Under Article 32(3) of the Code, NRAs, the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

The notification concerns the review of the regulated monthly access prices to ducts and poles. These fees are included in the reference offers of the SMP operator MEO – Serviços de Comunicação e Multimédia, S.A. (MEO) for access to ducts (ORAC) and for access to poles (ORAP), respectively.

2.1. Background

ANACOM last set up the prices for regulated access to ducts in 2006 (for most services) and 2007 (for three services⁶), and for regulated access to poles in 2010.

In its last review of the market for wholesale local access provided at a fixed location in Portugal (case PT/2016/1888⁷), ANACOM maintained the obligation on the SMP operator MEO to provide national regulated access to its ducts and poles at cost-oriented prices (together with regulate access to LLU⁸).

The Commission raised serious doubts in relation to the proposal not to regulate access to the fibre of the SMP operator (MEO). Following an in-depth investigation, the Commission issued a Recommendation⁹ under Article 7a of the Framework Directive¹⁰, requiring ANACOM to amend or withdraw the remedies relating to the access obligations imposed on MEO in those areas of the wholesale local (and

to ex ante regulation in accordance with the Code (the 2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23-31).

³ In accordance with Article 23 of the Code.

⁴ In its reply to question 1 of the 1st RFI, ANACOM explains that the public consultation started on 16 February 2022 and would initially end on 16 March 2022. ANACOM provided an extension of the consultation period by 5 working days, so that the public consultation ended on 23 March 2022

⁵ In accordance with Article 20(2) of the Code.

⁶ According to the reply to question 2.a of the 2nd RFI: occupancy per entry point, occupancy per cable slack and occupancy per connection point.

⁷ C(2016) 7674.

⁸ In addition to access, ANACOM also imposed obligations of cost-orientation, non-discrimination, cost accounting, accounting separation, financial reporting, and transparency.

⁹ C(2016) 7674.

¹⁰ 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).

central¹¹) access markets corresponding to the non-competitive areas identified at retail level where, on a forward looking basis, there were limits to the economic feasibility and likelihood of competitive NGA deployment and where there was no alternative wholesale access to NGA permitting sustainable competition. ANACOM did not follow the Commission's Recommendation and kept fibre unregulated.

Under case PT/2009/1012¹², ANACOM notified changes in ORAC related to the scope, the quality of service (including compensations), the level of transparency (including information on duct space), operational issues and demand forecasts. Under case PT/2013/1494¹³, ANACOM notified the lowering of some penalties in ORAC. Under case PT/2019/2193¹⁴, ANACOM notified changes to technical details in ORAC and ORAP. In all three case the Commission had no comments.

Under cases PT/2019/2159¹⁵, PT/2019/2195¹⁶, PT/2021/2294¹⁷ and PT/2022/2357¹⁸, ANACOM notified calculations of MEO's weighted average cost of capital (WACC) for each year from 2018 until 2021. The Commission had no comments in cases PT/2019/2159 and PT/2019/2195. However, in cases PT/2021/2294 and PT/2022/2357 the Commission noted that the prices of several regulated access products in Portugal had not been updated for a long time (in particular prices for access to ducts and poles). The Commission also noted that the review of market 2/2020 was already due and the review of markets 1/2020 and 3b/2014 was to be due in March 2022. The Commission strongly encouraged ANACOM to respect the deadlines as set out in the Code to regularly review and notify to the Commission markets and corresponding regulated access prices.¹⁹

2.2. Regulatory remedies

ANACOM notifies the review of the maximum monthly prices for regulated access to MEO's ducts and poles. Those prices were last set in 2006 (for most services) and 2007 (for three services) for ducts, and in 2010 for poles.

ANACOM argues that it has monitored the evolution of the regulated offers for access to ducts and poles (ORAC and ORAP) in the context of the audits carried out on MEO's analytical accounting system, considering that, in view of the margins

¹¹ Case PT/2016/1889, C(2016) 7674.

¹² C(2009)10661.

¹³ C(2013) 5949.

¹⁴ C(2019) 6266.

¹⁵ C(2019) 3426.

¹⁶ C(2019) 6914.

¹⁷ C(2021) 1246.

¹⁸ C(2022) 971.

¹⁹ In the reply to question 2 of the 1st RFI, ANACOM confirms that it expects to publicly consult the reviews of markets 1/2020, 2/2020 (also including market 14/2003), and market 3b/2014 in the second half of 2022. Provided that no major changes should be required after the public consultations, the notification to the Commission should take place within about 4 months after launching the respective national consultations.

reported²⁰, no regulatory intervention was justified until a relatively recent past. In ANACOM's view, only the cost data for the most recent exercises can confirm the existence of positive, consistent and expected margins to be maintained or improved in the future. In order to promote regulatory certainty, ANACOM is of the view that it should promote price changes that could reasonably be expected to be sustainable in the future, seeking to avoid fluctuations in wholesale prices.

In its reply to the RFI²¹, ANACOM explains that the margins of the regulated offers ORAC and ORAP were known to ANACOM as the audits of the successive financial years were completed. According to ANACOM, the fact that these services had negative margins after the initial price definition could possibly be explained by the fact that not all of the assumptions considered at the time were correct. ANACOM considers that nevertheless, the expected reduction in the costs of offers due to depreciation and the reduction in the associated cost of capital, as well as the possibility of a demand increase, combined with the fact that the margins reported showed convergence (in a broad sense) over time towards a value closer to equilibrium and, considering also that ANACOM intended to avoid fluctuating price regulation, contributed to the maintenance of the prices originally set.

In the notified draft measure ANACOM proposes a decrease of 35% in the maximum monthly access fees to ducts, and of 20% in the maximum monthly access fees to poles. ANACOM's price review is based on MEO's regulatory accounting data for 2019, audited by an independent entity²². ANACOM maintains the differentiation in the monthly fees for access to ducts and sub-ducts between one hand the municipalities of Lisbon and Porto, and on the other hand the rest of municipalities in the country. ANACOM²³ regards this price differentiation as adequate in the view of the variation in prices associated with the occupation of land in the municipalities of Lisbon and Porto compared to other geographical areas.

In its reply to the RFI²⁴, ANACOM explains that MEO's analytical accounting system used for regulatory purposes is a Fully Distributed Costs (FDC) model that is generally valued at historical costs and anchored in MEO's own operation. Therefore, the results reflect the costs effectively incurred by MEO with no considerations in relation to efficiency.

According to ANACOM²⁵, the evolution of the costs of ducts and poles in MEO's accounting system is almost exclusively explained by depreciation and the decrease in the cost of capital. ANACOM considers a depreciation period of 40 years for

²⁰ The margins for the regulated offers of ducts and poles were negative until 2016, and became positive as of 2017.

²¹ Reply to question 12 of the 1st RFI.

²² According to the reply to question 21 of the 1st RFI, the 2020 data is not yet audited. Such audit is not expected to be completed before Q4 2022.

²³ Reply to question 24 of the 1st RFI, as confirmed by reply to question 3 of the 2nd RFI.

²⁴ Reply to question 16 of the 1st RFI. According to the same reply, subject to the conclusions on the existence of SMP from the future market analysis, ANACOM does not disregard the possibility of promoting a new regulatory environment within these offers, including in that context the possibility — if deemed necessary, justified and proportionate — of building a new cost model, based on a hypothetical efficient operator.

²⁵ Reply to question 11 of the 1st RFI.

ducts and 20 years for poles²⁶. In the notified draft measure ANACOM estimates that [REDACTED] % of the duct network and [REDACTED] % of the pole network were depreciated in 2019.

ANACOM only reviews the recurrent monthly access fees for ORAC²⁷ and ORAP²⁸ since those fees prevail in terms of costs and revenues allocation within MEO's regulatory accounting data for 2019. In its reply to the RFI²⁹ ANACOM explains that although the proposed price reduction only applies to the monthly access fees, it takes into account all the services of the reference offer with the aim to achieve as a whole a margin close to zero for MEO. According to ANACOM, this would be the most effective way to achieve MEO's zero margin for the provision of regulated access to its ducts and to its poles.

According to the draft notified measure, the reviewed monthly maximum access prices are to be retroactively applied as of the date the draft measure was approved by ANACOM (15 February 2022). ANACOM argues that such retroactivity is justified on the one hand since it is allowed by Article 68(3) (a) of the Electronic Communications Law³⁰, and other hand by the need to give effect to the obligation of cost-orientation imposed on MEO.

In its reply to the RFI³¹, ANACOM adds that this decision is based on the understanding that it is necessary to balance efficiency and uncertainty, in so far as the advantages resulting from the anticipation of the entry into force of the regulatory measure are sought to be obtained with the promotion of regulatory predictability for all those affected by ANACOM's decisions (in this case, with the result that the price reduction enters into force in advance).

²⁶ Reply to question 10 of the 1st RFI.

²⁷ According to the reply to question 7 of the 1st RFI, ORAC provides prices of the following services: (i) information — access to Extranet (values disaggregated by district); (ii) feasibility analysis; (iii) access and installation (where monthly infrastructure access prices are included); (iv) intervention (corresponding to the prices of the service for monitoring and supervising the work to be carried out by the beneficiary of ORAC); (v) removal; (vi) clearances (are defined on a case-by-case basis, which must be accepted in advance by the beneficiary); and (vii) monitoring and supervision of the work.

²⁸ According to the reply to question 7 of the 1st RFI, ORAP provides prices of the following services: (i) feasibility and installation, which includes the following services: feasibility analysis, adequacy guaranteed, normal adequacy, access and installation, occupation (covering monthly infrastructure access prices); (ii) intervention (corresponding to the prices of the service for monitoring and supervising the work to be carried out by the beneficiary of ORAP); (iii) removal; and (iv) monitoring and supervision.

²⁹ Reply to question 7 of the 1st RFI.

³⁰ According to which “*the NRA may also determine amendments to the published reference offers, at any time and if necessary with retroactive effect, in order to give effect to the obligations imposed in accordance with Article 66*”.

³¹ Reply to question 5 of the 1st RFI.

3. COMMENTS

The Commission has examined the notification and the additional information provided by ANACOM and has the following comments:³²

3.1. Urgent need for timely review of markets and prices

The Commission welcomes ANACOM's notification of the monthly fees for access to ducts and poles, which have not been updated since 2006/2007 and 2010, respectively.

At the same time, the Commission notes, as it did in previous cases, that the prices of several regulated access products in Portugal have not been updated for a long period of time (LLU, copper bitstream and leased lines). The notifications to the Commission of the review of markets for wholesale local access provided at a fixed location, for wholesale dedicated capacity³³, for wholesale central access for mass-market products³⁴ and for trunk segments of leased lines³⁵ are also overdue.

The Commission takes good note of ANACOM's expected timeline to publicly consult the reviews of markets for wholesale local access provided at a fixed location, for wholesale dedicated capacity (also including market for trunk segments of leased lines), and market for wholesale central access for mass-market products in the second half of 2022. Provided that no major changes should be required after the public consultations, ANACOM expects to notify to the Commission the draft measures within about 4 months after launching the respective national consultations.

The Commission urges ANACOM to respect the deadlines as set out in the Code to regularly review and notify to the Commission markets and corresponding regulated access prices. In that respect, the Commission expects ANACOM to follow its timeline as communicated in its reply to the request for information without any further delays.

3.2. Retroactivity

The Commission notes that ANACOM has considered that there was no need to update the regulated prices for access to MEO's ducts and poles during 15/16 and 12 years, respectively. After such a long time absent any price review, ANACOM

³² In accordance with Article 32(3) of the Code.

³³ Corresponding to market 2 in the 2020 Recommendation on Relevant Markets.

³⁴ Corresponding to market 3b in the 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 (OJ L 295, 11.10.2014, p. 79–84).

³⁵ Corresponding to market 14 in the Commission Recommendation 2003/311/EC of 11 February 2003 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 communication networks and services (OJ L 114, 8.5.2003, p. 45)

intends now to apply the reviewed prices with retroactive effect as of 15 February 2022.

The Commission urges ANACOM to avoid setting prices with a retroactive effect, as this leads to legal uncertainty for market players. The Commission considers that any implementation of the decisions should in principle be forward looking and not have retroactive application. Instead ANACOM should ensure that prices are periodically reviewed to ensure that they correspond to economic conditions prevailing over any given regulatory cycle.

3.3. Need to notify any future amendments to the reference offers

ANACOM mentioned³⁶ that in 2009 and in 2014, respectively, issued two decisions modifying the reference offers concerning ORAC³⁷ and ORAP³⁸ which were not submitted to consultation at EU level. The Commission takes note of ANACOM's view that the said decisions should have not been notified at EU level as they did not constitute changes to the obligations already imposed on MEO (at that time PT Comunicações S.A.), but were meant just to set standard procedures and deadlines for sending and disseminating the information already collected.

However, the Commission considers that those decisions constitute a modification of a reference offer and therefore of the regulatory obligations imposed on MEO. According to Code it is important that national regulators consult all interested parties on proposed draft measures and take account of their comments before adopting a final decision. In addition, in order to ensure that decisions at national level do not have an adverse effect on the single market or TFEU³⁹ objectives, national regulators should also notify certain decisions to the Commission and other national regulators to give them the opportunity to comment.

The Commission reminds ANACOM that a reference offer constitutes a regulatory obligation as referred to in Articles 67 and 69 of the Code and its modification has an effect on trade between Member States. Therefore, the relevant draft measures are required to be notified under Article 32 of the Code.

In this regard it should be recalled that under the point 17 (a) of Recommendation 2021/554⁴⁰, modifications to reference offers that contain minor adjustments of the obligations already defined may be notified by the short notification procedure.

³⁶ Reply to question 4 of the 1st RFI, as confirmed by reply to question 2.b. of the 2nd RFI.

³⁷ The decision of 11.03.2009 on the publication of the performance levels in the quality of service (QoS) of several wholesale offers, including in ORAC.

³⁸ The decision of 11.12.2014 on the publication of the levels of performance in the quality of service of the ORAP.

³⁹ Treaty on the Functioning of the European Union (OJ C 202 7.6.2016, p. 47).

⁴⁰ Commission Recommendation (EU) 2021/554 of 30 March 2021 on the form, content, time limits and level of detail to be given in notifications under the procedures set in Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code (OJ L 112, 31.3.2021, p. 5 – 18).

In view of the above, the Commission underlines the obligation of ANACOM to notify its draft decisions and subsequently the adopted decisions regarding new reference offers or its amendments.

Under Article 32(8) of the Code, ANACOM shall take utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure. Where it does so, the NRA shall communicate it to the Commission.

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

Pursuant to Point 6 of Recommendation 2021/554 the Commission will publish this document on its website. If ANACOM considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information that you wish to have deleted prior to publication, please inform the Commission⁴¹ within three working days of receipt⁴². Please give reasons for any such request.

Yours sincerely,

For the Commission
Roberto Viola
Director-General

⁴¹ By email: CNECT-markets-notifications@ec.europa.eu

⁴² The Commission may inform the public of the result of its assessment before the end of this three-day period.