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Autoridade Nacional de
Comunicações (ANACOM)
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For the attention of
Ms. Fatima Barros
Chairperson

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Dear Ms Barros,

Subject: Commission Decision concerning

Case PT/2016/1888: Wholesale local access provided at a fixed location in Portugal

Case PT/2016/1889: Wholesale central access provided at a fixed location for mass-market products in Portugal

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

1. PROCEDURE

On 1 July 2016, the Commission registered a notification from the Portuguese national regulatory authority, *Autoridade Nacional de Comunicações* (ANACOM)¹, concerning

¹ 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.

the markets for wholesale local access provided at a fixed location², and wholesale central access provided at a fixed location for mass-market products³, both in Portugal.

The national consultation⁴ ran from 16 February to 6 April 2016.

On 12 July 2016, a request for information⁵ was sent to ANACOM. An additional request was sent on 14 July 2016. A response to the requests was received on 15 July 2016.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

2.1.1. Market 3a: Wholesale local access provided at a fixed location in Portugal

The last full 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/2008/0850⁶. The relevant product market was defined by ANACOM as incorporating all access products irrespective of the supporting technology (i.e. copper, cable⁷ and fibre products). The relevant geographic market was defined as national.

ANACOM designated PT Comunicações S.A (PTC) as the undertaking holding significant market power (SMP) on the basis of, inter alia, the following criteria: market shares, barriers to entry and expansion, and the lack of potential competition. ANACOM imposed on it the provision of access to the local loop and subloop and associated facilities, together with the obligations of (i) cost-orientation⁸; (ii) cost accounting; (iii) accounting separation; (iv) transparency; (v) non-discrimination, and (vi) financial reporting. Furthermore, ANACOM established the possibility to impose access to dark fibre when access to ducts is not possible, and the possibility to impose an access obligation to fibre, following the evolution of next generation access networks, after specific deliberation.

² Corresponding to market 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.

³ Corresponding to market 3b in the Recommendation on Relevant Markets.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ SG-Greffe (2009) D/3

⁷ Based on indirect constraints stemming from the retail level.

⁸ For the purpose of price regulation of unbundled access to the local loop and related facilities ANACOM used the information from the SMP operator's cost accounting model, which was a fully distributed historic costs ("FDHC") model. It was based on an activity based costing (ABC) methodology. ANACOM also used other price references and international benchmarks. It noted that Portugal was among the countries with the lowest prices for LLU access in the EU.

The Commission at the time expressed the view that, given the insufficiently justified indirect constraints of cable, the latter should not be included in the market definition as it would lead to an overstatement of the competitive constraints on LLU. The Commission invited ANACOM to impose remedies on fibre access products as appropriate following the national NGA consultation. The Commission also invited ANACOM to carefully monitor the progression of competition and to update its market analysis in respect of 12 MDFs considered as competitive even though PTC's market share at the retail level was still at or above 50% and where ANACOM was not able to demonstrate a downward trend in market shares.

2.1.2. Market 3b: Wholesale central access provided at a fixed location for mass-market products in Portugal

The last full review of the market for wholesale broadband access at a fixed location in Portugal was notified to and assessed by the Commission under case PT/2008/0851⁹. ANACOM concluded that copper (including self-supply), cable¹⁰ and fibre products belonged to the same relevant market. ANACOM also included self-supply by LLU operators in the relevant market on the basis of indirect constraints.

In terms of the geographic definition, ANACOM identified two relevant geographical markets:

- (i) a competitive or "C" area = areas covered by an MDF where there is at least one co-installed (LLU) operator and at least one cable operator, and where the cable penetration of the MDF area is above 60%¹¹. Thus the "C" area was comprised of 184 MDF areas which accounted for 61% of the total broadband accesses¹²;
- (ii) non-competitive or "NC" areas = all other areas.

ANACOM found no SMP in the competitive areas. In the non-competitive areas, based on SMP findings, ANACOM imposed on PTC the provision of access to and use of specific network facilities (including access to a Naked DSL offer), together with the obligations of (i) price control, (ii) cost accounting; (iii) accounting separation; (iv) transparency (including reference offers); (v) non-discrimination, and (vi) financial reporting.

The Commission expressed the view that ANACOM did not sufficiently justify the inclusion of cable and LLU based wholesale broadband access services in the relevant market based on indirect constraints. Moreover, the Commission invited ANACOM to carefully examine the need for the imposition of access remedies in market 5.

⁹ SG-Greffe (2009) D/4

¹⁰ Based on indirect constraints stemming from the retail level.

¹¹ ANACOM concluded that by using an indicator of 60% of cabled households per MDF, the homogeneity of market shares at MDFs can be maximized.

¹² Out of the 184 MDFs in the "C" area, PT Group has a market share in excess of 50% at 12 MDFs (which represent 1.7% of all broadband lines).

2.2. Market definition

2.2.1. Retail broadband markets in Portugal

ANACOM defines the retail product market as comprising broadband services over copper, fibre and cable.¹³

ANACOM carries out the geographic analysis on the basis of parishes (as opposed to exchange areas as in the previous review)¹⁴. ANACOM separates the retail market into (i) retail broadband access market in competitive areas, and (ii) retail broadband access market in non-competitive areas.

A given parish qualifies as a competitive area if one of the following two conditions is met:

- There are at least two alternative operators to MEO¹⁵, each with NGA¹⁶ coverage higher than 50% in the parish; or
- There is one alternative operator to MEO with NGA coverage higher than 50% in the parish and MEO's retail market share in the parish is below 50%.

There are 466 parishes that fulfil one of the two criteria above, and are therefore considered to be competitive (286 fulfilling the first criterion and 180 fulfilling the second one). The share of households¹⁷ belonging to a competitive parish is 56%. There are 48 parishes, within the 286 parishes fulfilling the first criterion, where MEO's market share is above 50%¹⁸. ANACOM expects those parishes to become competitive in prospective terms¹⁹.

¹³ According to ANACOM, when considering a retail broadband service market with a national presence, MEO had, at the end of 2015, a 48.7% market share, followed by NOS with 34.4%, Vodafone with 12.1% and Apax with 4.7% per cent.

¹⁴ ANACOM puts forward that in view of the increasing relevance of fibre and cable networks, and the decreasing importance of LLU, an infrastructure-agnostic geographic unit is more suited for the analysis. ANACOM adds that the number of unbundled local loops was close to 320 000 in 2008, while at the end of 2015 the corresponding value was approximately 99 000. There are 3 092 parishes and 1 852 exchange areas in Portugal.

¹⁵ 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.

¹⁶ Next Generation Access (fibre and cable DOCSIS 3.0)

¹⁷ The number of households in Portugal amounts to 5 859 661.

¹⁸ Those parishes correspond to 6% of the total retail broadband rentals and 5% of the Portuguese households. There are 30 parishes where MEO's market share is 50-60%, 8 parishes where MEO's market share is 60-70%, 7 parishes where MEO's market share is 70-80% and 3 parishes where MEO's market share is 80-90%.

¹⁹ Based on either the presence of NOS and Apax, together with the fact that Vodafone covers more than 50% of the parish and was one of the operators that acquired the highest number of retail customers in 2015, or on the presence of two alternative operators (NOS and Apax) with NGA coverage of 75% on average.

ANACOM concludes that the 466 competitive parishes have sufficiently homogenous conditions, whether in current or prospective terms, which are different from the remaining non-competitive parishes. In particular, ANACOM refers to MEO's market shares value and evolution over time.²⁰

The geographic market definition in market 3b will be based on the two criteria described above.

2.2.2. Market 3a: Wholesale local access market provided at a fixed location in Portugal

ANACOM considers accesses based on copper, fibre and cable, including self-supply, as being part of the relevant market.

ANACOM is of the view that cable belongs to the relevant market based on direct constraints. ANACOM puts 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 view²¹. ANACOM adds 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 also analyses indirect constraints and concludes that operators based on cable exert an indirect competitive constraint on market 3a²², which is significant enough to consider cable as part of the relevant product market. ANACOM puts 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 is mainly based on vertically integrated operators with their own networks using the other regulated offers in this market (access to ducts and poles).

ANACOM considers the geographic scope of the market to be national²³.

2.2.3. Market 3b: Wholesale central access provided at a fixed location for mass-market products in competitive and non-competitive areas in Portugal

ANACOM considers accesses based on copper, fibre and cable, including self-supply (also by LLU operators²⁴), as part of the relevant market.

²⁰ MEO's overall retail market share in the competitive areas in 2015 was 36%, slightly decreasing since 2013 (39%). NOS's overall retail market share in the competitive areas in 2015 was 43% (44% in 2013). MEO's overall retail market share in the non-competitive areas in 2015 was 84%, significantly increasing since 2013 (70%).

²¹ Localness, sufficient control for the access seeker, service not restricted to a specific set of speeds and no contention

²² In view of the similarities of the retail offers on fibre and on cable, and also (for similar speeds) on copper.

²³ ANACOM refers to MEO's network having national coverage and to the regulated wholesale offer presenting uniform prices throughout the national territory.

ANACOM is of the view that cable belongs to the relevant market based on direct constraints. ANACOM also analyses indirect constraints and concludes that operators based on cable exert an indirect competitive constraint on market 3b²⁵, which is significant enough to consider cable as being part of the relevant product market.

In terms of geographic market definition, ANACOM concludes that the differences in competitive conditions both at wholesale and retail level allow to identify two separate geographic markets corresponding to competitive and non-competitive areas (as defined in section 2.2.1).

2.3. Finding of significant market power ("SMP")

ANACOM proposes to designate MEO as holding SMP in market 3a due to its market share²⁶ and barriers to entry and to expansion²⁷. ANACOM adds that, regardless of the inclusion or not of cable accesses in the definition of market 3a, the findings as to the existence of SMP do not change since, in any case, it is concluded that MEO is dominant on a market defined as national in scope.

As to market 3b, ANACOM does not find SMP in the areas designated as competitive. On the contrary, in the non-competitive areas ANACOM finds MEO to hold SMP due to its market share²⁸ and barriers to entry and to expansion²⁹.

2.4. Regulatory remedies

2.4.1. Market 3a: Wholesale local access provided at a fixed location in Portugal

ANACOM proposes to continue to impose on MEO the obligation to provide access³⁰ to LLU³¹, and to ducts and poles³² at national level. Further, ANACOM imposes access to dark fibre³³ on a subsidiary basis, i.e. only when there is no space in ducts and poles.

²⁴ According to ANACOM, LLU beneficiaries provide a wholesale service to their vertically integrated retail department. In fact, although in practice these operators do not provide a wholesale supply of broadband access, they are able to do so and therefore are able to compete with MEO in this market, as has happened in the past.

²⁵ According to ANACOM, the consideration of indirect constraints at the SMP assessment stage may result in an underestimation of such constraints.

²⁶ The market shares in 2015, including self-supply, were as follows: MEO 50%, NOS 33%, Vodafone 12% and Apax 5%.

²⁷ 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.

²⁸ MEO's market share in 2015 was 82%, significantly increasing since 2013 (72%).

²⁹ 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.

³⁰ Together with the access obligations, ANACOM imposes (i) cost-orientation, (ii) non-discrimination, (iii) cost accounting, (iv) accounting separation, (v) transparency (including reference offers) and (vi) financial reporting.

However, ANACOM intends to keep fibre unregulated, not imposing on the SMP operator the obligation to provide physical or virtual fibre unbundling.

ANACOM justifies this, for the competitive areas, with the existence of retail competition. As to the non-competitive areas, ANACOM explains that the non-imposition of regulated access to fibre is based on proportionality grounds given that MEO's fibre coverage in the non-competitive areas is limited to [...] lines³⁴ and that the regulatory enforcement could constitute a disincentive to further NGA deployment. ANACOM also refers to a wholesale commercial access offer³⁵ to fibre published by MEO on 11 March 2016.

2.4.2. *Market 3b: Wholesale central access provided at a fixed location for mass-market products in non-competitive areas in Portugal*

ANACOM proposes to maintain the obligation to provide access to MEO's copper-based bitstream³⁶ service³⁷.

Also in this market, ANACOM intends to keep fibre unregulated, as it decides not to impose on the SMP operator the obligation to provide access to bitstream over fibre. ANACOM justifies this decision in line with its finding of non-proportionality in market 3a.

³¹ 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.

³² 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.

³³ Access to subsidiary 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.

³⁴ Which corresponds to about 3% of MEO's total fibre lines.

³⁵ In its draft measure, ANACOM does not analyse the impact of the commercial offer in the competitive assessment (it only provides the launch date of the offer and the link to MEO's website). In the request for information, the Commission asked ANACOM to assess how the offer would compare to a regulated one. In its reply, ANACOM only referred to MEO's view that [...]. ANACOM did not provide its own assessment of the offer, or of its adequacy as a basis for sustainable retail competition in the relevant areas.

³⁶ To date there is a single wholesale central access product provided at a fixed location for mass-market product (the ADSL PT Network offer, imposed on MEO). The reference offer is regulated since 2005. It was limited to non-competitive areas in 2009. The offer includes Ethernet bitstream aggregated at regional level. According to ANACOM, the demand at the beginning of 2016 was about 14 000 accesses.

³⁷ Together with the access obligation, ANACOM imposes (i) cost-orientation (cost orientation + margin squeeze test, instead of the previously applied retail-minus), (ii) non-discrimination, (iii) cost accounting, (iv) accounting separation, (v) transparency (including reference offers) and (vi) financial reporting.

3. ASSESSMENT

The Commission has examined the notifications and the additional information provided by ANACOM and has the following comment.³⁸

Inclusion of cable in markets 3a and 3b

ANACOM bases its inclusion of cable in markets 3a and 3b on both direct and indirect constraints.

The Commission first notes that based on the information contained in the notified draft measure cable is not unbundled in Portugal, either presently or prospectively, and therefore calls into question ANACOM's assertion of direct wholesale substitution with copper loops. While ANACOM points towards an eventual substitution of the cable termination segment with fibre, it does not draw any conclusions as to the availability of an unbundled cable access and by when this may be the case.

The Commission also understands that there is no wholesale bitstream offer based on cable in the market. Therefore even if there is a technical possibility of direct wholesale substitution in the central access market, the prospects of it occurring during the review period have not been demonstrated by ANACOM.

The Commission has previously noted that competition at the retail level from vertically integrated undertakings may be such as to exert an indirect constraint on the market for wholesale access services and that such indirect pricing constraints, where they are found to exist, should be taken into account in the context of the SMP assessment. As already underlined by the Commission in the context of previous cases, it is essential that the strength of the constraint posed by vertically integrated companies is correctly estimated in the assessment and the Commission has set out appropriate criteria against which the nature of such indirect substitution effects may be assessed³⁹.

In relation to the arguments put forward by ANACOM in this respect, the Commission highlights that ANACOM has not provided sufficient justification as to why a price increase would be entirely passed on to the end users of retail broadband access products and that competitors would not be able to at least partially absorb this price increase in their margins.

The Commission notes that ANACOM takes indirect constraints from cable into account in its market definition only for those parishes where it considers the presence of cable operators to be capable of exercising a sufficient competitive constraint (i.e. having at least 50% of coverage within the given parish). In view of this approach, even if indirect constraints were taken into account in the SMP assessment rather than in the market definition, this would not have led to a significantly different outcome compared to the one currently being proposed by ANACOM.

³⁸ In accordance with Article 7(3) of the Framework Directive.

³⁹ Explanatory Note to the Commission Recommendation 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 (C(2007) 5406), pp. 34-35. See also cases UK/2003/0032, NL/2005/0281, AT/2005/0312, and UK/2007/0733.

Consequently, even if it appears questionable to take those indirect constraints into account for the purpose of market definition, the Commission considers that this question could be left open in the present context, since a conclusion on whether such constraints should be taken into account in the definition of the relevant market or for the purposes of SMP assessment is not relevant in terms of the regulatory outcome.

Following the examination of the notification, the Commission considers that the notified draft measures fall under the Commission's powers of ensuring the consistent application of remedies as set out in Article 7a of the Framework Directive, as the notified measures aim at imposing obligations on undertakings in conjunction with Articles 9 to 13 of the Access Directive.⁴⁰

Draft measures imposing regulatory obligations on undertakings with SMP in Portugal may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. ANACOM's notification comprises measures that have a significant impact on operators or users in other Member States, inter alia measures which affect the ability to access crucial network bottlenecks to serve end-users. Consequently, such draft measures may affect the patterns of trade between Member States in a manner which might create a barrier to the single market⁴¹.

The Commission has serious doubts as to the compatibility with EU law of ANACOM's 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, in particular with the requirements referred to in Articles 8(4) and 12(1) and (2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive.

On the basis of the notification, the Commission has serious doubts in this regard for the following principal reasons:

Risk that draft measure does not promote or safeguard competition

Compliance with Articles 8(4) and 12(1) and 12(2)(d) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive

The Commission refers to Articles 8(4) and 12(1) and 12(2)(d) of the Access Directive⁴² that require NRAs (i) to impose obligations which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive and in relation to the imposition of access to, and use of, specific network elements;

⁴⁰ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p. 7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37.

⁴¹ See Recital 38 of the Framework Directive.

⁴² Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7 (of the Access Directive).

and (ii) to take into account – when considering how access obligations would be imposed proportionate to the objectives set out in Article 8 of the Framework Directive – the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure based competition.

Moreover, the Commission refers to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In addition, the Commission stresses that pursuant to Article 8(2) of the Framework Directive, NRAs shall promote competition in the provision of electronic communications networks and services by ensuring that there is no distortion or restriction of competition. In this regard, in pursuit of the policy objectives referred to in Article 8 (2) – (4) of the Framework Directive, according to Article 8(5) of the Framework Directive NRAs have to apply objective, transparent, non-discriminatory and proportionate regulatory principles by, inter alia, safeguarding competition to the benefit of consumers as well as promoting efficient investment and innovation in new and enhanced infrastructures.

After an assessment of the notified draft measures and ANACOM's responses to the Commission's request for information, the Commission is currently of the view that ANACOM's proposal threatens to distort and restrict sustainable competition on the retail market for mass-market broadband in the so-called non-competitive areas by virtue of the failure to impose regulatory remedies with regard to fibre networks on either the local or the central access markets in Portugal, contrary to the provisions of Article 8(4) of the Access Directive, which requires to impose obligations which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

The Commission has also serious doubts that ANACOM's draft measure fulfils the requirements set in of Article 16(4) of the Framework Directive to impose appropriate specific regulatory obligations on undertakings identified as individually or jointly holding significant market power.

With regard to the wholesale local access market in Portugal, ANACOM finds that MEO holds SMP on a national market, which includes copper, fibre and cable. ANACOM considers it appropriate and proportionate to impose access to the copper local loop⁴³ at national level, but fails to impose on the SMP operator an obligation to provide access to the unbundled fibre line, in both competitive and non-competitive areas. ANACOM justified this, for the competitive areas, with the existence of retail competition. For the non-competitive areas, ANACOM argues that the imposition of access to the fibre optic infrastructure would be disproportionate, also in view of the low number of fibre lines, and the disincentive to invest into fibre infrastructure in the non-competitive areas such access obligation would bring about.

⁴³ And access to ducts and poles, and to dark fibre on a subsidiary basis.

First, the Commission is of the view that the obligations proposed by ANACOM, specifically in the non-competitive areas in market 3a, are not appropriate to address the competition problem identified. ANACOM's regulatory proposal to alleviate the competition problems identified is insufficient in that, according to ANACOM's own assessment of market 3a, a significant share of the retail customers⁴⁴ located in the non-competitive areas will not be able to benefit from an effectively competitive retail market neither at present nor on a forward looking basis.

The Commission acknowledges ANACOM's attempt to differentiate remedies on the basis of different competitive conditions observed at the retail level, and the success to date of wholesale remedies as regards pole and duct access in facilitating NGA deployment and efficient, infrastructure-based competition in the so-called competitive areas. The Commission also notes ANACOM's legitimate interest to take into account incentives for efficient investment in NGA roll-out, in the interest of end users, also in so-called non-competitive areas. However, in light of the very limited economic prospects for such competitive deployment to emerge in less densely populated areas in the short or medium term, there is no reasoned justification in the draft measure how the non-imposition of fibre access could allow the emergence of a sustainable competitive market at retail level as required by Article 12(1) of the Access Directive, and how ANACOM would fulfil its obligations under Article 12(2)d of the Access Directive, to safeguard competition in the long term, especially where fibre emerges to be an important access infrastructure also in the so-called non-competitive areas. In this regard, the Commission notes that, according to ANACOM's notification, 30% of broadband accesses in Portugal already enable at least 100 Mbps download.⁴⁵

According to Article 12(1) of the Access Directive, NRAs may impose access obligations in situations where the denial of access would hinder the emergence of a sustainable competitive market. ANACOM has imposed cost-oriented access to MEO's copper infrastructure in view of MEO's retail market share in the non-competitive areas (at 84% in 2015 and increasing over the last years), and control over infrastructure which is (economically) difficult to replicate. ANACOM does not provide any evidence that MEO's commercial fibre access offer referred to in the draft measure is offered at reasonable terms and whether this offer is taken up at all by alternative operators. The adequacy of this commercial offer should therefore be further examined; however, based on the information contained in the draft measure the Commission has no reason to believe that without an access obligation MEO would grant third party access to its fibre lines at reasonable terms.

In order to safeguard competition, with particular attention to economically efficient infrastructure based competition in line with the requirements of

⁴⁴ 44% of Portuguese households.

⁴⁵ This implies an even higher take-up rate of such high-capacity retail offers in those parts of the country (largely the so-called competitive areas) where such offers are in fact available, testifying therefore to a considerable potential competitive significance of fibre also in other parts of the country as and when it is deployed.

Article 12(2)d of the Access Directive, ANACOM should have considered imposing an access obligation at the optical distribution frame which allows alternative operators to invest in connecting their core networks to the ODF, and take, from there, an appropriate wholesale local access product at regulated conditions allowing to reach the end user at a fixed location.

The Commission cannot at this stage follow ANACOM's argument that the imposition of a fibre access remedy would be disproportionate. MEO has already built [...] lines in the non-competitive areas, and therefore the imposition of an access remedy on an existing infrastructure appears to be justified 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. As far as concerns the proportionality of a fibre access remedy and its relationship to incentives to deploy NGA networks, the Commission has given extensive guidance on how appropriate remedies can be designed in view of the commercial uncertainties and risks associated with deployment of NGA networks, which may be particularly relevant in more rural areas with low density of population and potentially lower levels of income and digital literacy, and in cases where very capital intensive deployments such as fully-fibred very high capacity networks are envisaged. In particular, as laid down in the Commission Recommendation on Non-discrimination and Costing⁴⁶, in the presence of certain pricing constraints on the SMP operator (e.g. from cost-oriented regulated wholesale access to the copper network, or from other infrastructures), of guarantees of non-discriminatory access and of economic replicability of retail offers, direct regulatory price controls of the appropriate local or central wholesale access product may not be necessary. ANACOM's draft measure does not analyse in detail the possibility to tailor appropriate fibre access remedies in more challenging areas in the light of such considerations, or how the deployment incentives of the SMP operator would be negated if any such remedies were imposed. The Commission therefore has serious doubts at this stage as to whether an appropriate balance has been drawn between the different objectives of the Framework in ANACOM's draft measure.

Moreover, the absence of regulated wholesale local access largely removes any incentive there might have been for the SMP operator to offer to co-invest on fair and reasonable terms with alternative operators, laying a basis for more sustainable competition such as has been witnessed in the so-called competitive areas.

Equally, in the areas of the wholesale central access market where MEO is found to hold SMP, which correspond to the non-competitive areas also identified on the local access market, ANACOM again confines regulation to copper-based access, failing to impose any form of access to bitstream over fibre. The Commission considers that contrary to the provision of Articles 8, 12(1) and 12(2)d of the Access Directive, read in conjunction with Articles 8 and 16(4) of the Framework Directive, ANACOM has failed to demonstrate

⁴⁶ Commission Recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (Recommendation on Non-Discrimination and Costing), OJ L 251, 21.9.2013, p.13.

how it ensures the emergence of a sustainable competitive market at retail level and safeguards competition in the long term. It is in fact highly unlikely that due to the specific economics of density in the non-competitive areas (which in the Commission's understanding are mainly rural areas) sustainable competition could emerge without a central access product based on fibre, especially where fibre lines subsequently replace copper lines as the principal form of retail broadband access. Indeed, in light of the declining number of LLU accesses, wholesale central access may be acquiring greater competitive significance over time.

In this respect, where NRAs consider that, in a given geographic area, there is effective local access to the SMP operator's fibre network and that such access is already likely to result in effective competition on the downstream level, NRAs should consider removing the obligation of wholesale bitstream access in the area concerned. However, ANACOM fails to impose the obligation of wholesale bitstream access over fibre in non-competitive areas even in a situation where no appropriate wholesale local access to the SMP operator's fibre network is commercially provided or imposed.

In conclusion, the Commission has serious doubts that the draft measure notified by ANACOM in its current form is – pursuant to Article 8(4) of the Access Directive – based on the nature of the problem identified, proportionate and objectively justified in the specific Portuguese context and meets the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, in particular as regards the promotion of competition and of efficient investment in the interest of end users. In addition, based on the information currently available, the Commission has serious doubts that the draft measure is able to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition, as required by Article 12(1) and 12(2)(d) of the Access Directive and can be considered to be appropriate in light of Article 16(4) of the Framework Directive.

The above assessment reflects the Commission's preliminary position on these particular notifications, and is without prejudice to any position it may take vis-à-vis other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measures on the market for wholesale local and central access provided at a fixed location in Portugal shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC⁴⁷, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission⁴⁸ within three working days following receipt whether you

⁴⁷ 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, OJ L 301, 12.11.2008, p. 23.

⁴⁸ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.

consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,

For the Commission,
Vera Jourova

Member of the commission