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## **COMMISSION RECOMMENDATION**

**of 29.11.2016**

**in accordance with Article 7a of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive") in Cases PT/2016/1888 and PT/2016/1889: Wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products, both in Portugal**

(Only the Portuguese version is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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")<sup>1</sup> and in particular Article 7a (5) thereof,

Having called on interested parties to submit their observations pursuant to the provision cited above<sup>2</sup> and having regard to their observations,

Having regard to the opinion of the Body of European Regulators for Electronic Communication (BEREC)<sup>3</sup>,

Whereas:

## 1. PROCEDURE

- (1) From 16 February to 6 April 2016, the Portuguese Regulatory Authority, Autoridade Nacional de Comunicações (ANACOM), carried out a national consultation<sup>4</sup> concerning the markets for wholesale local access provided at a fixed location<sup>5</sup>, and wholesale central access provided at a fixed location for mass-market products<sup>6</sup>, both in Portugal.
- (2) On 1 July 2016, the Commission registered a notification from ANACOM<sup>7</sup>, concerning the markets for wholesale local access provided at a fixed location, and

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<sup>1</sup> 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> Notice published at: <https://circabc.europa.eu/w/browse/0fc4cbf9-3412-45fe-84bb-e6d7ba2f010e>.

<sup>3</sup> Opinion of BEREC of 8 September 2016.

<sup>4</sup> In accordance with Article 6 of the Framework Directive.

<sup>5</sup> 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.

<sup>6</sup> Corresponding to market 3b in the Recommendation on Relevant Markets.

<sup>7</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

wholesale central access provided at a fixed location for mass-market products, both in Portugal.

- (3) On 29 July 2016, the Commission, pursuant to Article 7a(1) of the Framework Directive, initiated a phase II investigation and subsequently notified ANACOM and BEREC, respectively, of the reasons as to why it had serious doubts as to the compatibility of the draft measure with EU law (the "Serious doubts letter").
- (4) On 8 September 2016, BEREC delivered its opinion to the Commission<sup>8</sup> and fully supported the Commission's serious doubts.

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

### **2.1. Previous notifications**

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

- (5) 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/2008/0850<sup>9</sup>. The relevant product market was defined by ANACOM as incorporating all access products irrespective of the supporting technology (i.e. copper, cable<sup>10</sup> and fibre products). The relevant geographic market was defined as national.
- (6) ANACOM designated PT Comunicações S.A (PTC) as the undertaking holding significant market power (SMP). ANACOM imposed on it the provision of access to the local loop and subloop and associated facilities, together with the obligations of (i) cost-orientation<sup>11</sup>; (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 was not possible, and the possibility to impose an access obligation to fibre, following the evolution of next generation access networks, after specific deliberation. Access to fibre was not imposed during the relevant review period.
- (7) The Commission at the time expressed the view that, given the insufficiently justified indirect constraints of cable, the latter should not have been 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.

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(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>8</sup> In accordance with Article 7a(3) of the Framework Directive.

<sup>9</sup> SG-Greffe (2009) D/3

<sup>10</sup> Based on indirect constraints stemming from the retail level.

<sup>11</sup> 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.

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

- (8) 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/2008/0851<sup>12</sup>. ANACOM concluded that copper (including self-supply), cable<sup>13</sup> 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.
- (9) In terms of the geographic definition, ANACOM identified two relevant geographical markets:
- competitive or "C" areas = 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%<sup>14</sup>. Thus the "C" area was composed of 184 MDF areas which accounted for 61% of the total broadband accesses<sup>15</sup>;
  - non-competitive or "NC" areas = all other areas.
- (10) ANACOM found no SMP in the C areas. In the NC 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.
- (11) 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 the market.

## 2.2. The notified draft measures

### 2.2.1 Definition of retail broadband markets in Portugal

- (12) ANACOM defines the retail product market as comprising broadband services over copper, fibre and cable.<sup>16</sup> ANACOM carries out the geographic analysis on the basis of parishes (as opposed to exchange areas as in the previous review)<sup>17</sup>. ANACOM

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<sup>12</sup> SG-Greffe (2009) D/4

<sup>13</sup> Based on indirect constraints stemming from the retail level.

<sup>14</sup> ANACOM concluded that by using an indicator of 60% of cabled households per MDF, the homogeneity of market shares at MDFs can be maximized.

<sup>15</sup> 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).

<sup>16</sup> According to ANACOM, when considering a retail broadband service market with a national presence, MEO (the former PTC) 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.

<sup>17</sup> 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

separates the retail market into (i) retail broadband access market in C areas, and (ii) retail broadband access market in NC areas.

- (13) A given parish qualifies as a C area if one of the following two conditions are met:
- There are at least two alternative operators to MEO<sup>18</sup>, each with NGA<sup>19</sup> 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%.
- (14) There are 466 parishes that fulfil one of the two criteria above, and are therefore considered to be competitive. 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.<sup>20</sup> The share of households<sup>21</sup> in Portugal belonging to a competitive parish is 56%.

### 2.2.2 Market 3a: Wholesale local access products provided at a fixed location in Portugal

- (15) ANACOM considers accesses based on copper, fibre and cable, including self-supply, as being part of the relevant market. ANACOM considers the geographic scope of the market to be national<sup>22</sup>.
- (16) ANACOM proposes to designate MEO as holding SMP in market 3a due to its market share<sup>23</sup> and barriers to entry and to expansion<sup>24</sup>. 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.
- (17) ANACOM proposes to continue to impose on MEO at national level the obligation to provide access<sup>25</sup> to LLU<sup>26</sup>, and to ducts and poles<sup>27</sup>. Further, ANACOM imposes

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at the end of 2015 the corresponding value was approximately 99 000. There are 3 092 parishes and 1 852 exchange areas in Portugal.

<sup>18</sup> On 29 December 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>19</sup> Next Generation Access (fibre and cable DOCSIS 3.0)

<sup>20</sup> MEO's retail market share in the C areas was 36% in 2015, and 39% in 2013. NOS's retail market share in the C areas was 43% in 2015, and 44% in 2013. MEO's retail market share in the NC areas was 84% in 2015 and 70% in 2013. Given that the geographic market definition is not exactly the same as in 2013, a direct comparison is not possible.

<sup>21</sup> The number of households in Portugal amounts to 5 859 661.

<sup>22</sup> ANACOM refers to MEO's network having national coverage and to the regulated wholesale offer presenting uniform prices throughout the national territory.

<sup>23</sup> The market shares in 2015, including self-supply, were as follows: MEO 50%, NOS 33%, Vodafone 12% and Apax 5%.

<sup>24</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>25</sup> 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.

<sup>26</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.

access to dark fibre<sup>28</sup> on a subsidiary basis, i.e. only when there is no space in ducts and poles. However, ANACOM intends to keep fibre unregulated, not imposing on the SMP operator obligations in relation to the provision of physical or virtual fibre unbundling.

- (18) ANACOM justifies this, for the C areas, with the existence of retail competition. As to the NC 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 NC areas is limited to [...] lines<sup>29</sup> and that the regulatory enforcement could constitute a disincentive to further NGA deployment. ANACOM also refers to a wholesale commercial access offer<sup>30</sup> to fibre published by MEO on 11 March 2016.
- (19) By way of a comment, the Commission expressed the view that the inclusion of cable in the relevant market based on both direct and indirect constraints was not sufficiently justified.

### 2.2.5 *Market 3b: Wholesale central access for mass-market products provided at a fixed location in Portugal*

- (20) ANACOM considers accesses based on copper, fibre and cable, including self-supply (also by LLU operators<sup>31</sup>), as part of the relevant 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 C and NC areas as defined at retail level.
- (21) ANACOM does not find SMP in the market corresponding to the areas designated as competitive at retail level. On the contrary, on the wholesale market corresponding to the NC areas at retail level, ANACOM finds MEO to hold SMP, due to its market share<sup>32</sup> and barriers to entry and to expansion<sup>33</sup>.
- (22) As to the wholesale market corresponding to the NC areas at retail level, ANACOM proposes to maintain the obligation to provide access to MEO's copper-based

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<sup>27</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.

<sup>28</sup> 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.

<sup>29</sup> Which corresponds to about 3% of MEO's total fibre lines.

<sup>30</sup> 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 the offer is comparable to the one of SFR (in France) and those of DStelecom and Fibroglobal (receiving public funds to connect rural areas in Portugal), and provides for risk sharing among MEO and the access seeker. 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.

<sup>31</sup> 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.

<sup>32</sup> MEO's market share in 2015 was 84%, and in 2013 it was 72%. Given that the geographic market definition is not exactly the same a direct comparison is not possible.

<sup>33</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.

bitstream<sup>34</sup> service<sup>35</sup>. 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 on the basis of the same arguments as for market 3a.

- (23) By way of a comment, the Commission expressed the view that the inclusion of cable in the relevant market based on both direct and indirect constraints was not sufficiently justified.

### **3. SERIOUS DOUBTS EXPRESSED BY THE COMMISSION WHEN INITIATING THE SECOND PHASE OF THE ARTICLE 7a PROCEDURE**

- (24) On 29 July 2016, the Commission expressed serious doubts as to the compatibility of the draft measure with EU law concerning the ability of alternative operators to obtain local and central access provided at a fixed location in Portugal.

- (25) The Commission referred to Articles 8(4) and 12(1) and 12(2)(d) of the Access Directive 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; 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.

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

- (27) Regarding the wholesale local access market in Portugal, the Commission was of the view that the non-imposition of an obligation to provide access to the unbundled fibre line, specifically in the NC areas identified at retail level, appeared inappropriate to address the competition problem identified. The Commission considered ANACOM's regulatory proposal as insufficient in that, according to ANACOM's own assessment of market 3a, a significant share of the retail customers<sup>36</sup> located in the NC areas will not be able to benefit from an effectively competitive retail market neither at present nor on a forward looking basis.

- (28) The Commission acknowledged the success to date of regulated pole and duct access in facilitating NGA deployment in the so-called competitive areas. The Commission also noted 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.

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<sup>34</sup> 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 NC 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.

<sup>35</sup> 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.

<sup>36</sup> 44% of Portuguese households.

- (29) However, the Commission stated that, in light of the very limited economic prospects for a competitive deployment to emerge in less densely populated areas in the short or medium term, there is no reasoned justification in the notified draft measure as to 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. In particular ANACOM did not provide any evidence with its notification that without an access obligation MEO would grant third party access to its fibre lines at reasonable terms in the NC areas identified at retail level, where MEO had an overall retail market share of 84% in 2015.
- (30) The Commission could not accept ANACOM's argument that the imposition of a fibre access remedy would be disproportionate. MEO has already built [...] lines in the NC areas identified at retail level, and therefore the imposition of an access remedy on an existing infrastructure in these areas 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.
- (31) Moreover, the Commission was of the view that ANACOM's draft measure does not analyse in detail the possibility to tailor appropriate fibre access remedies in more challenging areas as laid down in the Commission Recommendation on Non-discrimination and Costing<sup>37</sup>, or how the deployment incentives of the SMP operator would be negated if any such remedies were imposed.
- (32) Further, the Commission noted that the absence of regulated wholesale local access to fiber would largely remove 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.
- (33) As to the areas of the wholesale central access market where MEO is found to hold SMP, ANACOM again confines regulation to copper-based access, failing to impose any form of access to bitstream over fibre. The Commission considered 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 had failed to demonstrate how it would ensure the emergence of a sustainable competitive market at retail level and safeguard competition in the long term.
- (34) 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 even in a situation where no appropriate wholesale local access to the SMP operator's fibre network is commercially provided or imposed.
- (35) In conclusion, the Commission had serious doubts that ANACOM's notification was – pursuant to Article 8(4) of the Access Directive – based on the nature of the

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<sup>37</sup> 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.

problem identified, proportionate and objectively justified in the specific Portuguese context and met 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 available at the time, the Commission had serious doubts that the draft measure was 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 could be considered to be appropriate in light of Article 16(4) of the Framework Directive.

#### **4. OBSERVATIONS SUBMITTED BY THIRD PARTIES**

- (36) The Commission has received comments from four third parties.
- (37) Operator 1 does not agree with ANACOM's market assessment. Operator 1 considers that the most important factor in network deployment in Portugal has been co-investment and not the regulated access to ducts and poles. It further considers highly unlikely that co-investment opportunities arise again in the prospective future. Therefore, the announced prospects for alternative operators to deploy their own fibre in NC areas in the short or medium term are unfounded, even more taking into account the significantly higher costs of deployment in those areas. Operator 1 considers that the only way to promote co-investment is through the imposition of regulated access to fibre on the SMP operator in the NC areas. As to the commercial offer, Operator 1 considers that it is not only disproportionate on the terms but it leads to margin squeeze. It is therefore impossible for Operator 1 to offer competitive fixed services based on MEO's commercial offer.
- (38) Operator 2 considers that the draft measures proposed by ANACOM threaten to restrict and distort competition in the broadband retail market at national level due to the non-imposition of fibre regulation. As to MEO's commercial offer, Operator 2 considers that it is only profitable in the case of a high number of customers per location, it does not cover current accesses but only accesses to be built, prices are inflated and it is therefore not appropriate to address the needs of operators with geographically scattered customers. Operator 2 considers that a regulated access to both fibre unbundling and bitstream over fibre are key to allow alternative operators to effectively compete in Portugal.
- (39) Operator 3 refers to *inter alia* the competitive pressure exerted by Long-Term Evolution (LTE) operators, the spill-over effects from more to less competitive areas, and the fact that NOS has the largest NGA network in the country, to conclude that the imposition of a fibre access obligation would result in an unwarranted discrimination of MEO, and would be disproportionate, unreasonable and unjustified. Operator 3 puts forward that a decision to regulate MEO's fibre would constitute a clear disincentive to investment, both for MEO and for alternative operators. As to MEO's commercial offer, Operator 3 considers that proper time and space are needed for operators to reassess their strategies and successfully negotiate. Operator 3 adds in this respect that the fundamental reason why the commercial offer may not generate high demand is the ability of operators to achieve superior efficiency levels building their own networks, using the regulated offers of access to ducts and poles.
- (40) A European trade association considers that ANACOM's draft measures are the best approach for the Portuguese market, where access obligations on ducts and poles provide all the operators with equal incentives and conditions to deploy their own

networks. The trade association claims that the NC areas are over-dimensioned since ANACOM did not consider LTE as part of the market definition and refers to a track record of voluntary commercial agreements between operators in the Portuguese market. Further, it considers that regulating fibre would disincentivise not only MEO but also alternative operators that would adopt a "wait and see" strategy. The trade association notes that negotiations between MEO and other operators are still in progress and that the proper time and space are needed for the negotiations to produce effects. Regarding the current review of the regulatory framework, the trade association points at the need to provide the right incentives to innovate and deploy networks, as well as at to impose obligations which are proportionate to the nature of the problem identified.

## **5. PROCEDURE FOR CONSISTENT APPLICATION OF REMEDIES**

### **5.1. BEREC's Opinion**

- (41) On 8 September 2016 BEREC adopted an opinion on the Commission's letter of serious doubts pursuant to Article 7a (3) of the Framework Directive.
- (42) BEREC considered that the Commission's serious doubts are justified.
- (43) First, BEREC is of the opinion that ANACOM had failed to deliver sufficiently convincing argumentation for not including a fibre access obligation on market 3a and (secondary) on market 3b corresponding to the identified NC areas at retail level. In particular, ANACOM should give more weight to the arguments concerning the foreseeable development of competition in the retail broadband access market in Portugal.
- (44) BEREC points out that ANACOM has provided no analysis of the likelihood of further fibre deployment by alternative operators in the NC areas in its draft decision, but at the same time it states that the replication of MEO's copper network (presumably by new fibre networks) is not viable specifically in the NC areas. BEREC highlights that there seems to be a high degree of uncertainty concerning the development of competition in the retail market for fixed broadband access in Portugal.
- (45) BEREC acknowledges ANACOM's argument that MEO's current NGA market share is low and that it is hard to predict the evolution of competition in the Portuguese market. Nevertheless, it considers that there is the risk that, given ANACOM's proposals, MEO will deploy the fibre network with the highest coverage in the NC areas, becoming the main (fibre) operator in the retail market and correspondingly maintaining its high market share (currently, 84%). This would result in consumer harm, particularly if the copper network is switched off and the options of customers are restricted.
- (46) Even if ANACOM were unable to investigate the current investment plans of operators, the Portuguese NRA should at least assess in detail the credibility and commitment expressed in the current announcements (especially by MEO) and the likelihood of a business case for large scale fibre roll-out by alternative operators in the NC areas.
- (47) Second, BEREC agrees with the Commission that ANACOM has not substantiated why the imposition of a fibre access remedy in the wholesale local and central access markets in the NC areas would be disproportionate.

- (48) BEREC argues that ANACOM should closely assess how likely it is that there is no or very limited demand from alternative operators for access to MEO's fibre network. BEREC takes notice of the fact that access-based competition (retail offers based on LLU and bitstream) is limited and does not play a significant role in the Portuguese market. However, BEREC believes ANACOM should also analyse whether this is likely to be the case with regard to the corresponding fibre-based retail offers. The analysis should encompass the geographical dimension to ensure that the conclusion holds true even in the less densely populated NC areas, where broadband penetration is relatively low (30%).
- (49) BEREC considers that ANACOM already explicitly mentioned in its 2009 market decision that regulation of access to MEO's fibre networks was a possibility after specific deliberation during the previous regulatory period. Also, in its draft decision ANACOM explicitly alerts the market that it will monitor mainly the NC areas, which could result in ANACOM revising its decision not to regulate MEO's fibre at any time during the coming regulatory period. ANACOM does not explain how despite such statements, MEO and other operators have not already incorporated the regulatory risk of fibre regulation in their current investment plans, especially given that any large investor has to take into account relevant future risks for long-term investments.
- (50) Third, BEREC agrees with the Commission that ANACOM failed to provide convincing arguments as to why access remedies, in particular with pricing freedom, could not be made compatible with investment incentives.
- (51) ANACOM argued that MEO may not be rewarded for the risk it took in investing in fibre. However, as suggested in the Commission Recommendation on Non-discrimination and Costing, this risk could be rewarded by pricing freedom, as opposed to a charge control, where fibre is constrained by the copper network. ANACOM was also concerned that the regulated operator may be accused of margin squeeze if it replicated other firms' strategies, but BEREC considers this risk can be mitigated by appropriately designed margin squeeze tests.
- (52) BEREC is of the opinion that ANACOM should also include in its market review a thorough analysis of MEO's fibre access commercial offer, as well as a reasonable explanation of why a light-touch access remedy would deter the investment incentives of the operators present in the market. BEREC considers that there is no reason to believe that MEO would have an interest in providing access to its fibre lines at reasonable conditions.
- (53) Another relevant point for BEREC is that ANACOM did not provide an explanation as to why a commercial agreement for access concluded with MEO would have no negative effects on investments, while, in the case of a similar regulated offer, the effect would be to deter investments.
- (54) Fourth, BEREC considers that the correlation between regulation and co-investment is not always clear, given that some co-investment initiatives have been observed in regulatory contexts where an access obligation was not imposed.
- (55) Finally, BEREC recommends ANACOM to include in its forward-looking assessment a more thorough analysis of how future investments may influence future market shares, an assessment of the future demand for access to MEO's fibre network, and an analysis of whether MEO's commercial fibre offer has the characteristics that could make a fibre access obligation in the NC areas unnecessary.

Otherwise, BEREC cannot support the non-imposition of fibre-based wholesale access products in the NC areas.

## **5.2. Close Co-operation between ANACOM, BEREC and the Commission**

- (56) ANACOM, BEREC and the Commission closely co-operated pursuant to Article 7a (2) and (4) of the Framework Directive in order to identify the most appropriate and effective measure in light of the objectives laid down in Article 8 of the Framework Directive.
- (57) On 5 October 2016 a tripartite meeting was held between ANACOM, BEREC and the Commission with the aim to identify the most appropriate and effective measure which could address the Commission's serious doubts in line with Article 7a of the Framework Directive. On this occasion and thereafter, ANACOM continued to provide additional information on some of the points raised by the Commission and BEREC. However, no agreement was reached between ANACOM, BEREC and the Commission.
- (58) At the end of the three-month period following the Commission's notification of its serious doubts to ANACOM and BEREC, ANACOM did not amend or withdraw its draft measures.

## **5.3. Conclusion of the procedure opened to ensure the consistent application of the remedies**

- (59) Since ANACOM maintained its draft measures at the end of the three-month period following the Commission's notification of its serious doubts in accordance with Article 7a(1) of the Framework Directive, the Commission, taking utmost account of the opinion of BEREC, may issue a recommendation requiring ANACOM to amend or withdraw the draft measures or take a decision to lift its reservations indicated in the letter of serious doubts.
- (60) After taking into account the reasoning provided in BEREC's opinion, and the information exchanged during the process of close co-operation as envisaged in Article 7a(2) of the Framework Directive, the Commission considers that the reservations expressed in its serious doubts letter concerning the draft measure, as notified by ANACOM, remain valid. In this respect, the Commission underlines that its serious doubts relate to the regulatory solution in the wholesale local access market, in particular the non imposition of a fibre access remedy in at least parts of the NC areas defined at retail level, as well as to the regulatory solution in the wholesale central access market.
- (61) First, in relation to the wholesale local access market, during the exchanges of views with ANACOM, the latter raised a number of points regarding the greater economic feasibility and likelihood of competitive NGA deployment in parts of the NC area with demographic and economic characteristics similar to the C areas where such deployment has taken place at considerable scale; or on the other hand, on the likelihood that sustainable competition could be ensured in other parts of the NC area where open NGA networks deployed with the assistance of State aid give wholesale access to alternative operators. The predominantly qualitative data presented by ANACOM during the Phase II investigation seem to support this idea. The Commission acknowledges the margin of appreciation of NRAs in delineating areas of a broader geographic market subject to SMP in which, on the basis of a prospective analysis and of concrete local specificities, the scope and intensity of appropriate remedies to address the identified competition problems may vary. This

may be particularly the case as regards the transition to NGA, which operators may organise step-wise, and in a market where the availability of, and conditions for, access to necessary civil infrastructure assets have created a favourable deployment dynamic such that a purely static delineation based on actual deployments to date may not fully capture the potential over a market review period for efficient infrastructure competition. Equally, it is entirely legitimate for the NRA to assess in its market analysis whether the availability of wholesale access to NGA assets other than those of the SMP operator in a specific area justifies an adaptation of SMP remedies relative to areas where such alternative networks offering wholesale access do not exist. However, the Commission is currently only in a position to assess the regulatory approach in the wholesale markets with the geographical scope as notified by ANACOM. The Commission notes that such a significant change in the scope of the relevant geographic areas would require ANACOM to submit a revised draft measure for EU consultation and will examine constructively any such revised approach.

- (62) Moreover, even if ANACOM had taken into account such considerations in the notified measure and had delineated the NC areas differently, and without prejudice to the Commission's assessment of any such alternative delineation, it seems likely that there would remain in any event a significant subset of – especially more rural – parishes where there are no concrete prospects of either market-driven competitive NGA deployment or of publicly supported deployment accompanied by wholesale access. Thus, on any view, the concerns raised in this case would at a minimum continue to apply to such a subset of the NC areas defined at retail level and would need to be addressed with pertinent evidence in any revised draft measure.
- (63) ANACOM claims that there is no reason to believe that investments will not occur in the absence of wholesale fibre access regulation imposed in the the parts of the country corresponding to the NC areas at retail level. ANACOM bases its assessment, among other factors, on public announcements and past investments at national level by operators, the competitive constraint exerted by fixed LTE accesses, the households covered by NOS and open rural networks in NC areas, and the proposed improved conditions for access to ducts and poles. In ANACOM's view, fibre access regulation should only be imposed if it is possible to demonstrate that fibre deployment/competitive dynamics would not develop in NC areas and therefore that regulation will not jeopardize such dynamics. ANACOM argues that the prospect for fibre roll-out (including in the NC areas) by alternative operators is likely but the extent to which such roll-out will materialise in the short, medium or long-term cannot be determined with certainty.
- (64) ANACOM generally refers to investments at national level. The vast majority of network deployment in Portugal has taken place in the C areas. While the Commission acknowledges that operators might also be likely to deploy NGA networks in some of the areas currently considered by ANACOM to be non-competitive at the retail level over the upcoming regulatory period, during the phase II investigation ANACOM has not provided sufficient evidence that the predominantly rural parts included in the NC area at retail level will attract alternative fibre investments to an extent that could lead to effectively competitive retail broadband markets during the relevant review period.
- (65) The Commission considers that in order to demonstrate that there is a business case for alternative operators to deploy fibre relying solely on a regulated access to ducts and poles, ANACOM should examine further the main drivers of economic viability

of such deployments. This economic viability assessment could, for example, quantify the investment required per customer, taking into account *inter alia* the density of population, the expected average revenue per user (ARPU), as well as the critical penetration rate. The significant deployment in the C area should provide ample evidence of the threshold values regarded as acceptable by the various operators active in the market and should also give insight on the take-up levels that can be expected following deployment, thereby reducing over time the related uncertainties about returns on investment.

- (66) In assessing the prospects of competitive deployment, it is opportune to consider whether co-investment could lower the threshold for alternative operators. A co-investment offer by the SMP operator which enabled sustainable competition on corresponding retail markets, in particular one covering parts of the NC area where full infrastructure competition appears non-viable, would be pertinent to the question of the appropriate scope of remedies. However, the results of the phase II investigation do not indicate that MEO is likely to offer co-investment opportunities to alternative operators similar to those previously agreed in the C areas, in the event that ANACOM's draft measures are adopted. Therefore, in the absence of any concrete initiative in this sense by MEO, it is not possible simply to assume that such co-investment offers permitting sustainable competition will be made. As to the possibility that a co-investment agreement in the NC areas could be reached between Vodafone and NOS, there is no evidence available to the Commission.
- (67) During the phase II investigation ANACOM has further highlighted the role of LTE accesses at a fixed location<sup>38</sup> as a competitive constraint on MEO in NC areas at retail level. ANACOM puts forward that the number of such accesses provided by altnets in NC areas has increased from 66 000 in Q3 2014 to 125 000 in Q4 2015<sup>39</sup>. The Commission recognises that offers based on fixed LTE are on a significant growth trajectory, and begin to play a role which may become even more considerable in the future, in particular because they offer certain performance characteristics superior to MEO's copper network. Thus, such fixed wireless access services could be a basis for the two main alternative operators, which also have mobile arms, to build retail market share in the NC area, including the more rural parts, on more favourable economic terms than through the regulated LLU offer, which is not intensively exploited by them and is declining in significance. Moreover, a retail market position built up in this way over time could also serve as a springboard for customer migration to NGA, and thus to sustainable NGA deployment in at least some parts of the NC area. However, the Commission also notes that in ANACOM's draft measure LTE was not considered to be part of the relevant retail market and not taken into account as an indirect competitive constraint on MEO<sup>40</sup>. Therefore, this limits the way in which the Commission can take this factor into account in the present case. In the event of notification of a revised measure, ANACOM would *inter alia* need to elaborate further on the growth trends

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<sup>38</sup> LTE access at fixed location do not adequately support a TV subscription service which seem to be the driver of broadband bundles in Portugal (at the end of 2015 more than 88% of the broadband access market included a TV subscription). NOS combines its LTE offer with satellite TV.

<sup>39</sup> ANACOM claims that if fixed-based LTE accesses are taken into account, between 2014 and 2015 around 75% of the new broadband subscribers in the NC areas were provided by alternative operators (mostly on the basis of LTE accesses).

<sup>40</sup> According to ANACOM, commercial LTE offers at a fixed location were introduced only in mid-2013, therefore the time series of market data is quite short.

cited to date, and their effect over time either (i) directly on MEO's retail market share (in the event of inclusion in the relevant retail market, MEO would still have a market share of 72% instead of 84% in the NC areas on the basis of the latest figures available to the Commission), or (ii) on the business case for alternative operators to develop their own NGA infrastructure. In addition, ANACOM would need to address questions as to the ability of an LTE-based offer to compete in a market where triple-play offers increasingly predominate at the retail level, in particular by taking into account how additional costs for satellite delivery would affect the sustainability of such offers.

- (68) As a result, the Commission concludes that ANACOM has not provided sufficient evidence in the present proceedings showing that the proposed remedies - which do not include the imposition of fibre access in the wholesale local access market even in the predominantly rural parts of the NC area - will likely allow a sustainable competitive market to develop at retail level during the review period.
- (69) Second, ANACOM argues that regulating fibre in the NC areas would be disproportionate *inter alia* due to the fact that: the competition problem identified stems from MEO's market share of copper-based broadband subscribers; MEO's fibre roll-out in the NC areas is very limited; there is a lack of market saturation in the NC areas; the customers' ability to switch providers; and the lack of retail market failures (regarding NGA offers both in C and NC areas).
- (70) The Commission notes that both fibre and copper are part of the relevant market, that MEO has a very high market share in the NC areas (84%) at retail level and has already built [...] fibre lines there. Without prejudice to the points made above regarding the inconclusive evidence on co-investment or fixed wireless access, the Commission remains of the view, based on the evidence available, that the imposition of an access remedy on an existing infrastructure appears to be justified in at least a part of the wholesale local access market which corresponds to the predominantly rural NC areas (identified at retail level) in view of the need to safeguard competition, in particular where MEO intends to deploy at a larger scale and eventually replace the existing copper infrastructure. The terms of such an access remedy would of course need to be weighed up carefully in light of the specific features of the areas to be addressed – e.g. lower population density and higher unit costs; lower incomes, digital literacy and broadband penetration, etc.
- (71) As to the dynamics of the retail market, especially in the predominantly rural NC areas, the Commission points to ANACOM's own assessment in the notified draft measures in which ANACOM understands that the obligations imposed on market 3a are not likely, particularly in the short term, to create effective competition in the downstream markets in these areas.
- (72) As a result, the Commission concludes that ANACOM has not substantiated why the imposition of a fibre access remedy on the wholesale markets in at least the predominantly rural NC areas identified at retail level would be disproportionate; and should ANACOM wish to revise its geographic market delineation at retail and wholesale level, notably as regards to the NC areas which are more urban in character or benefit from a subsidised open NGA network, this should take the form of a revised draft measure which needs to be subject to a new consultation procedure at Union level in accordance with Article 7 of the Framework Directive.
- (73) Third, during the process of close cooperation ANACOM has provided only limited information regarding the commercial offer of MEO and a thorough analysis as to

the reasonableness of its access conditions is still lacking. ANACOM puts forward that the existence of this commercial offer was not, per se, a relevant factor to conclude that imposing a fibre access obligation on MEO at wholesale level in the NC areas would not be necessary, adequate or proportionate. The Commission considers that ANACOM should carry out a thorough analysis of MEO's fibre access commercial offer in order to have a complete overview of the competitive conditions in the NC areas.

- (74) During the phase II investigation it has become clear that, to date, there is no take-up of MEO's commercial offer, although negotiations have taken place between MEO and alternative operators. The commercial offer would require alternative operators to connect to MEO's network on capacity steps of 30%. Also, when a customer is lost or when an alternative operator fails to acquire the customer, the access seeker is obliged to continue paying for the unused capacity during a minimum of 5 years. As to the economic conditions, an alternative operator considers the prices MEO is proposing to be unreasonable and disproportionate and to lead to a margin squeeze while facing the disadvantage of a significantly smaller customer base.
- (75) Based on the limited information available, and in the absence of any detailed submission on this point by ANACOM, the Commission maintains its view that there are insufficient grounds to consider that MEO offers third party access to its fibre lines on reasonable terms permitting sustainable competition, which could obviate the need for regulated access to address the competition problems identified by ANACOM in some or all of the NC areas.
- (76) Fourth, ANACOM puts forward that the imposition of a (tailored) access obligation would constitute an unjustified burden on MEO. It would imply considerable costs that could dissuade MEO from investing in those areas, also in view of the requirements on non-discrimination (Equivalence of Input) and economic replicability of retail offers mandated by the Commission Recommendation on Non-discrimination and Costing. According to ANACOM, applying an economic replicability test to a fibre offer in the NC areas could lead to a wholesale price below costs. ANACOM adds that a 'market penetration strategy' pricing by alternative operators might lead MEO to incur losses as it would have to lower not only its retail prices to compete, but also the wholesale rates in order to ensure economic replicability, possibly having to apply wholesale prices below costs.
- (77) The Commission points out that according to the economic replicability test as laid out in the Commission Recommendation on Non-discrimination and Costing the profitability of a specific fibre-based product is evaluated on the basis of a multi-period analysis and the test is therefore designed to accommodate market penetration strategies by the SMP operator. The NRA should in fact identify a reference time period over which the margin between the retail and NGA wholesale access price allows for the recovery of downstream costs. Where for this purpose a discounted cash flow approach was used, this does not imply that downstream costs should be covered at the earlier stages of market penetration.
- (78) Moreover, given that it appears that MEO is prepared to voluntarily grant access to its fibre network and alternative operators are reportedly willing to take up a reasonable offer, the Commission is of the view that a tailored regulated access to fibre would not be a disruptive remedy. On the contrary, such a regulatory approach would be coherent with the current market developments and would allow ANACOM to complement and regulate currently disputed elements of MEO's

existing commercial offer, rather than replace it, in the event that MEO does not itself unilaterally improve that offer.

- (79) As a result, the Commission stresses that ANACOM could consider adjusting the key characteristics of MEO's commercial offer related to access conditions, quality of service and SLAs, in order to foster an agreement between operators for accessing MEO's fibre in the NC areas. In the alternative to the approach to pricing flexibility outlined in the Commission Recommendation on Non-discrimination and Costing, the similarities in MEO's proposed payment structure suggest that such an agreement could follow models used, for example, in Germany and the Netherlands, which provide for long-term access to infrastructure based on up-front payments as a way of risk-sharing, as well as for volume discounts.
- (80) As to the market for wholesale central access, the Commission remains of the view that NRAs should consider removing the obligation of wholesale bitstream access over fibre in the area concerned only where there is effective local access to the SMP operator's fibre network and such access is already likely to result in effective competition on the downstream level, or where competition is otherwise likely to become effective at the downstream level (e.g. on the basis of offers based on other infrastructures). However, ANACOM fails to impose the obligation of wholesale bitstream access over fibre in the identified non-competitive market (which corresponds to the NC areas identified at retail level), even in a situation where no appropriate wholesale local access to the SMP operator's fibre network is commercially provided or imposed and prospects of infrastructure-based competition in at least parts of the NC areas at retail level are weak.
- (81) The Commission concludes, in the light of the evidence currently available and of the assessments put forward in the notification itself, that ANACOM's notified draft measures concerning the ability of alternative operators to obtain local and central access provided at a fixed location in Portugal in its current form are not appropriate, in particular in light of the policy objectives and regulatory principles enshrined in 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.
- (82) On the basis of the above, and recalling its reasons expressed in the serious doubts letter, the Commission issues the present recommendation requiring ANACOM to amend or withdraw the draft measures.

#### HEREBY ISSUES THIS RECOMMENDATION:

1. ANACOM should 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 NC areas identified at retail level where, on a forward looking basis, there are limits to the economic feasibility and likelihood of competitive NGA deployment and where there is no alternative wholesale access to NGA permitting sustainable competition, in order to address the Commission's concerns set out above. In particular, in these areas, ANACOM should impose on MEO a wholesale obligation to provide access to the unbundled fibre line as well as to bitstream over fibre. In doing so, ANACOM should consider whether to grant MEO a degree of pricing flexibility for the fibre access product in line with the Commission Recommendation on Non-discrimination and Costing. ANACOM should also consider to use MEO's commercial offer as a basis for the regulated access product.

2. ANACOM should submit an amended draft measure to the Commission, BEREC and other NRAs without undue delay, having regard to the objectives laid down in Article 8 of the Framework Directive, and with particular regard to Article 8(3)(d) of the Framework Directive, which requires ANACOM to co-operate with other NRAs, with the Commission and with BEREC so as to ensure the development of consistent regulatory practice.
3. The Commission will publish this recommendation on its website. ANACOM is invited to inform the Commission within three working days following receipt of this recommendation whether it considers that, in accordance with European Union and national rules on business confidentiality, it contains confidential information which ANACOM wishes to have deleted prior to publication. Any such request should be reasoned.
4. In accordance with Article 7a(7) of the Framework Directive, where ANACOM decides not to amend or withdraw the draft measure on the basis of this recommendation, it shall provide the Commission with a reasoned justification.
5. In accordance with Article 7a(6) of the Framework Directive, ANACOM shall communicate the adopted draft measure to the Commission by 29 December 2016. This period might be extended, at ANACOM's request, to allow ANACOM to undertake a public consultation in accordance with Article 6 of the Framework Directive.
6. This Recommendation is addressed to ANACOM.

Done at Brussels, 29.11.2016

*For the Commission*  
*Günther OETTINGER*  
*Member of the Commission*

